of furthering the Columbia Basin project. The Commission so created was required to make reports of its activities, expenditures and the developments to all regular and special sessions of the Legislature. It has made two reports; the first bearing date of December 19, 1933, and the second bearing date of January 22, 1935, covering the period from December 19, 1933, to January 1, 1935. Plaintiffs refer to those reports for a history of the connection of the state of Washington with the Columbia Basin project and of what has been done respecting the project by the State and the United States, either in conjunction with each other or inde- [fol. 6] pendently one of the other, and ask that those reports be considered for all purposes germane to this bill as though set forth at large herein. Plaintiffs also crave reference to the printed copy of the hearings before the Committee on Irrigation and Reclamation, House of Representatives, Seventy-second Congress First Session On The Bill H. R. 7446 and ask that it also be read as a part of this bill, so far as germane thereto.

6. Upon, to wit, June 16, 1933, the President made the following executive order:

"Administration of Public Work

"Pursuant to the authority of 'An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes', approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof:

"1. I hereby appoint Colonel Donald H. Sawyer to exercise temporarily the office of Federal Emergency Administrator of Public Works.

"2. I hereby appoint a Special Board for Public Works consisting of the following: The Secretary of the Interior, Chairman; The Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; Colonel George R. Spaulding, and Assistant Secretary of the Treasury Robert.

"During the ensuing 30 days the Federal Emergency Administrator of Public Works shall have authority to allot the

sum of not to exceed $400,000,000 provided for in title II of said act for highway building for distribution among the states, Territories, and the District of Columbia, and authority to allot the sum of not to exceed $238,000,000 to the Department of the Navy for the construction of certain vessels, the construction whereof conforms to the London Naval Treaty and has heretofore been approved by me.

"The Distribution of the money herein allocated for public words shall be subject to the approval of the Board for Public Works.

"The Federal Emergency Administrator of Public Works is hereby authorized to employ such necessary personnel on a temporary basis as may be approved by the Board.

[fol. 7] "During the next 20 days it shall be the duty of the Federal Emergency Administrator of Public Works and the Board herein constituted to study and report to me on all public-works projects which have heretofore been submitted or shall hereafter be submitted.

"Franklin D. Roosevelt."

"The White House, June 16, 1933."

This was followed on June 8, 1933, by the appointment of Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works. Thereafter, the President, under authority of Title II of the National Industrial Recovery Act, passed at the first session of the Seventy-third Congress 1933, and particularly of Sections, 201, 202 and 203 of said Act, directed the Administrator of Public Works to include in the program of public works enumerated in and contemplated by Section 202 the Grand Coulee dam and power plant in the State of Washington as a part of the Columbia Basis project in such state. There followed from time to time orders of the Special Board relating to the Grand Coulee dam which appear as Exhibits 1, 2, 3, 4, and 5 to the bill, and to be read as a part hereof so far as germane. A contract relating to preliminary work on the Grand Coulee dam was entered into between the United States, acting through the Department of the Interior, Bureau of Reclamation and the State of Washington, acting through the Columbia Basin Commission. A copy of that contract is attached as exhibit 6 hereto, and is prayed to be read as a part hereof in showing the progress of the project. Later another contract was made between the same parties, acting through the

same agencies, a copy of which is attached hereto, marked exhibit 7, and is to be read as a part of the bill for the purpose of showing the history and progress of the project. Still later the Department of the Interior, Bureau of Reclamation, [fol. 8] prepared Specifications No. 570 for the construction of a part of the work aforesaid as a part of the Columbia Basin project, and called for bids for doing the work thereon. Among others, plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company) bid on the work and their bid was accepted. Upon, to wit, July 16, 1934, a contract was entered into by the United States of America, parties of the one part, and the plaintiffs (other than the Mason-Walsh-Atkinson-Kier Company), parties of the other part, whereby the second parties agreed to furnish labor and materials and to perform all work required for the construction of that part of the Grand Coulee dam and power plant, as covered by Items 1 to 85, inclusive of the schedule of Specification 570, Columbia Basin Project, and were to receive as consideration for the performance of the work and for such labor and materials as were agreed to be supplied by them the total sum of $29,339,301.50.

7. Each of the plaintiff organizations (other than the Mason-Walsh-Atkinson-Kier (Company) is a business organization doing business (principally in contracting and allied lines) on a large scale in widely separated parts of the United States. No one has any business connection or interrelation with any other, save that the three organizations made a joint bid for the advertised work on the Grand Coulee dam. It was necessary that that work be done in a unitary manner, and that its transactions, obligations and profits should be kept entirely separate from the other business enterprises then carried on or thereafter to be carried on by each of the organizations operating separately. For administrative purposes in the performance of the contract and the accounting for losses or profits arising therefrom, and that there might be no confusion of the jointly undertaken work with the severally conducted business operations of the three contracting organizations elsewhere they caused the plaintiff Mason-Walsh-Atkinson-Kier Company to be organized as a corporation under the laws of the State of Delaware, directly or through their agents taking all the [fol. 9] capital stock of that corporation and furnishing all its officers. Deeming that an assignment or other transfer

of the contract was forbidden by #15, Title 41, U. S. C. A. (R. S. #3737), the plaintiffs making the contract with the United States aforesaid entered into an agreement with plaintiff Mason-Walsh-Atkinson-Kier Company, a copy of which is attached hereto, marked Exhibit 8, and is prayed to be read as a part hereof. From the beginning and at every step in its progress, the work on the Grand Coulee dam agreed to be done by the contracting plaintiffs under their contract with the United States, has been done by their agent and alter ego, the Mason-Walsh-Atkinson-Kier Company. Through the officers and agents whom they have placed in charge of it, the contract with the United States is being performed. They alone are responsible for the performance of the contract, they have given bond in the sum of $5,000,000 for its performance, and they alone will profit or lose through its performance. The corporation Mason-Walsh-Atkinson-Kier Company is an entity brought into being by them for the more convenient and economical doing of the work under the contract. In speaking hereafter of things done by plaintiffs in the performance of the contract or dealings in connection therewith, it is to be understood that the particular action was taken directly and in fact by the Mason-Walsh-Atkinson-Kier Company, but as the agent of the other plaintiffs; hence the allegation will be that it was done by the plaintiffs without distinguishing between them.

8. Under the aforesaid contract the United States undertook and agreed to furnish a large part of the materials required for the construction of the dam and power plant, and the plaintiffs have agreed to furnish the remainder of such materials and to do all the work necessary for its construction. Among other stipulations of the contract, it was provided:

[fol. 10] (1) That the officer entering into the contract on behalf of the United States and in charge of the work required to be done thereunder, called the contracting officer, might, at any time, by a written order, make changes in the drawings and specifications of the contract and within the general scope thereof, and that if such changes should cause an increase or decrease in the amount agreed to be paid for the work and materials furnished by plaintiffs an equitable adjustment should be made.

(2) That should either of the parties discover, during the progress of the work, sub-surface or latent conditions

at the site of the work materially differing from those shown on the drawings accompanying the contract or indicated in the specifications, the attention of the contracting officer should be immediately called to such conditions, and if he found that they materially differed from those shown on the drawings or indicated in the specifications he should make such changes in the drawings and specifications as he might find necessary, and any increase or decrease of cost or difference in time resulting from such changed conditions should be equitably adjusted.

(3) That plaintiffs should furnish to the contracting officer for his approval, the name of the manufacturer of machinery, mechanical and other equipment which they contemplate installing, together with their performance capacities and other pertinent information, and the contracting officer should, if he approved thereof, so indicate, and that any machinery, equipment, materials and articles installed or used without such approval, should be at the risk of subsequent rejection.

(4) That only such unmanufactured articles, materials and supplies as have been mined or produced in the United States, and only such manufactured articles, materials and supplies as have been manufactured in the United States should be used in the performance of the work unless otherwise provided in the specifications.

[fol. 11] (5) That only articles, materials and supplies produced under codes of fair competition, approved under Title I of the National Industrial Recovery Act or under the President's Re-employment Commission, should be used in the performance of the work except when the contracting officer certified that the requirement was not in the public interest.

(6) That, so far as practicable, and subject to the provisions of the two preceding paragraphs, preference should be given to the use of locally produced materials unless such use involved higher cost, inferior quality or insufficient quantities as might be determined by the contracting officer.

(7) (a) No Mongolian labor should be employed in the performance of the work required of plaintiffs.

(b) No convict labor should be employed on the project, and no materials manufactured or produced by convict labor should be used thereon.

(c) The contracting officer might require plaintiffs to dismiss from the work such employes as the contracting officer might deem incompetent, careless, insubordinate, or otherwise objectionable.

(d) Except in executive, administrative and supervisory positions, so far as practicable and feasible in the judgment of the contracting officer, no individual directly employed on the project should be permitted to work more than 40 hours in any one week and more than 8 hours in any one day.

(e) All employes directly employed on the work should be paid just and reasonable wages which should be compensation sufficient to provide for the hours of labor as limited and a standard of living in decency and comfort; the minimum hourly wage rate for skilled labor should be $1.20 and [fol. 12] for unskilled labor 50 cents, and rate for semi-skilled labor should be fixed so as to fall between the minima fixed for skilled and unskilled labor and bear normally the relation to these existing in the locality of the work.

(f) The maximum of human labor should be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

(g) The plaintiffs should extend to every person performing the work of a laborer or mechanic on the project the benefits of the labor and wage provisions of the contract regardless of any contractual relationship between the plaintiffs and such labor- or mechanic.

(h) The Federal Emergency Administrator of public works and the contracting officer should have access to all payrolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of the contract.

(i) Plaintiffs were required to report in triplicate, monthly, through the contracting officer, within five days after the close of each calendar month, on forms to be furnished by the United States, Department of Labor, the number of persons on their respective payrolls, the aggregate amount of such payrolls, and the amount of hours worked, wage scales paid to various classes of labor, and the total expenditures for materials.

(j) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work

should be posted in a prominent and easily accessible place at the site of the work, and the plaintiffs should keep a true and correct record of the hours worked by, and the wages paid to each employe, and furnish the contracting officer with a sworn statement thereof on demand.

[fol. 13] (k) All employees should be paid in full not less often than once each week and in lawful money of the United States in the full amount accruing to each individual at the time of the closing of the payroll, and there should be no deduction or rebates on account of goods purchased, rent, or other obligation.

(l) The minimum wage rates established should be subject to change by the Federal Emergency Administrator of Public Works on recommendation of the Board of Labor Review.

(m) The Board of Labor Review should hear all labor issues arising under the contract, and such as might result from fundamental changes in economic conditions during the life of the contract, and the decision of the Board of Labor Review should be binding upon all parties.

(n) Preference should be given, when qualified, to ex-service men, in certain manner and order specified.

(o) To the fullest extend possible labor required for the project should be chosen from the list of qualified workers submitted by local employment agencies designated by the United States Employment Service, but organized labor skilled and unskilled, should not be required to register at the local employment agencies but should be secured in customary way through recognized union locals.

(p) Plaintiffs agreed to comply with the conditions prescribed in Sections 7a-1 and 7a-2 of Title 1 of the National Industrial Recovery Act.

(q) Pursuant to the foregoing provisions, and other provisions therein contained, the Department of the Interior, Bureau of Reclamation, has caused the United States Employment Service to establish one of its local offices on the federal area described in paragraph 6 of this complaint, by means of which such United States Employment Service, on behalf of the United States of America, directs the em-[fol. 14] ployment of and furnishes to these plaintiffs, all

the workers used by the plaintiffs in the performance of said contract, save only the administrative personnel of the plaintiffs.

(8) That the contracting officer might order the plaintiffs to suspend any work that might be subject to damage by climatic conditions.

(9) The contracting officer was authorized to establish sanitary and police rules and regulations for all forces employed upon the work.

(10) That the construction program should be at all times subject to the approval of the contracting officer, and the capacity of the construction plant, sequence of operations and methods of operation should — such as to ensure the completion of the work within the period of time specified in the contract, and that revised construction programs should be submitted by the plaintiffs at intervals of not more than six months, and the contracting officer be advised immediately of any proposed changes in the program.

(11) That when additional information regarding foundation or other conditions become- available as a result of the excavation work, further testing, or otherwise, if it should be found desirable to change the location, alignment, dimentions or designs of the dam or power plant to meet such conditions, the United States should have the right to make such reasonable changes as in the opinion of the contracting officer should be considered necessary or desirable and plaintiff should be entitled to no extra compensation because of such changes except that any increase in the amount of excavation, concrete or other required work for which items are provided in the schedule, should be paid for at the unit price bid therefor in the schedule.

[fol. 15] (12) That if, at any time within the contract period, the construction of the Grand Coulee dam to the full height contemplated for the ultimate development of the project should be authorized, the United States should have the right to terminate the contract upon 30 days notice in writing, whereupon all materials on hand, improvements, etc., should be turned over to the United States and payment should be made therefor at cost plus 10%.

(13) That sand and gravel required in the construction work should be obtained from designated gravel deposits

which were to be acquired by the United States and turned over to plaintiffs for purposes of the work, subject to a number of stated conditions.

(14) That the United States has designated a tract of land on the east side of the Columbia River as a site for use for office headquarters, buildings, warehouses, garages, commissary, hospital, dormitories, boarding houses, homes for the contractors' employes, and other incidental purposes, and the plaintiffs were required to construct, maintain and operate under competent direction, on the site designated, all such facilities above described as might be required for carrying out the contract; the construction operation and maintenance of such facilities to be subject to the approval of the contracting officer.

(15) Plaintiffs were required to perform such grading, surfacing and maintenance of streets in the camp site as in the opinion of the contracting officer should be required to provide for safe and satisfactory use by the public, and to construct suitable sidewalks to serve all parts of the camp site, and to light the streets in a designated manner. With the exception of churches and other eleemosynary institutions, all buildings and improvements in the camp site were required to be constructed and owned by the [fol. 16] plaintiffs.

(16) That the type of construction and plans and specifications for the buildings erected in the camp site should be subject to the approval of the contracting officer.

(17) That the plaintiffs should construct and furnish adequate water system for supplying the camp site with water for domestic purposes, fire protection and irrigation purposes, all subject to the approval of the contracting officer.

(18) That the plaintiffs should furnish and install a complete sewer system that should serve every house within the camp site, all details subject to the approval of the contracting officer.

(19) That in addition to the facilities to be operated by the plaintiffs, they were permitted to lease space in buildings erected and owned by them for conducting such business and services as in the opinion of the contracting officer might be required for the convenience of the residents of the camp site, but all leases should be subject to the

approval of the contracting officer and should contain provisions making them subject to termination by the contracting officer.

(20) The quality of quarters provided for the use of the employes are regulated and the prices which might be charged therefor. Similar provision was made for the regulation of meals furnished and the rates chargeable therefor.

(21) That plaintiffs should make the necessary arrangement with the proper state and county authorities for school facilities and instruction for the families of the employes and other residents in the camp site, for which no charge should be made. All these arrangements are subject to approval by the contracting officer.

(22) The contracting officer was given authority to determine all questions arising in the performance of the contract for which no other specific provision was made.

[fol. 17] 9. In due course plaintiffs entered upon the performance of the contract aforesaid, and they ever since have been and now are engaged in the work required of them by such contract. All such work is and must be done upon lands required by the United States of America, by purchase or condemnation, within the state of Washington, and all such lands were acquired for the purposes of the public works known as the Columbia Basin project, and described in the executive and administrative orders and bulletins providing for and referring to the construction of the Grand Coulee dam and power plant as a part of such project. The business of performing and rendering services for which the tax in controversy in this suit is sought to be laid was and will be wholly upon such lands, and the income received and to be received by plaintiffs, which will be used by the Tax Commission as the basis for measuring the amount of the tax which it intends to require plaintiffs to pay, is and will be the income derived from the business of rendering and performing services for the United States upon the aforesaid lands, and in the performance of their contract with the United States as aforesaid. Plaintiffs are not, and none of them is, engaged in any other business, calling, occupation, vocation or work within the State of Washington than the work prosecuted by them on lands

of the United States and under contract with the United States aforesaid.

10. The Tax Commission asserts that plaintiffs are subject to the payment of an occupation tax under the provisions of Chapter 191, Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington, Extraordinary Session 1933, on account of the services rendered and performed by them under their contract with the United States upon the lands aforesaid, and that such tax is to be measured by the amount paid to them by the United States for service rendered to the United States as aforesaid. Plaintiffs deny, and each of them denies, that they [fol. 18] are subject to the payment of the demanded tax, and refuse to make a return for the basis of computation of the tax upon the compensation paid to them by the United States. The Tax Commission, by its duly authorized agents, has now made demand upon plaintiffs, and upon each of them, for the production of all books, papers, records and other data bearing upon and relating to plaintiffs' contract with the United States for the work done and to be done on the Grand Coulee dam and power site of the Columbia Basin project, upon the work done by plaintiffs under such contract, and upon the compensation received therefor. The Commission threatens to and will issue subpœnas and summons requiring plaintiffs and their officers to appear before the Commission and testify concerning the matters and things aforesaid, and to produce plaintiffs' books, papers, records, and all other data bearing upon said matters. Should plaintiffs and their officers fail to appear and testify, or should plaintiffs persist in their refusal to produce their books, papers, records and other data bearing upon their contract with the United States and what has been and is being done thereunder, the Commission will enforce or endeavor to enforce against plaintiffs and their officers, through proceedings in the courts, the pains and penalties prescribed by said Chapter 191 for failure to make returns, to produce books, papers, records and other data demanded by the Commission and to appear and testify as witnesses upon summons of the Commission.

11. In addition to all other legal objections to the usurpations of power by the Tax Commission which are disclosed by the complaint, the Commission's threatened proceed-

ings and the tax which it is about to lay are in violation of plaintiffs' rights under the Constitution of the United States in the following particulars:

(1) Plaintiffs are agencies and instrumentalities of the United States of America in carrying out the program of public works for National Industrial Recovery authorized [fol. 19] and put in force and executed by the Congress and the President, especially in the prosecution of the building of the Grand Coulee dam and power plant of the Columbia Basin project. The tax which defendants are threatening and attempting to levy and collect from plaintiffs is a tax upon the contract between the United States and plaintiffs, and is a tax upon the means employed by the United States in doing the work required by the contract with plaintiffs. Such a tax is forbidden by the fundamental principles of the constitutional system of the United States.

(2) Plaintiffs are citizens and residents of states other than Washington. They are within the state of Washington solely for the purpose of carrying out their contract obligations with the United States. Their only occupation within the state of Washington is the performance of the contract with the United States, and therefore, the income which they receive is income derived from the discharge of an employment by the United States, and this income is beyond the power of the state to tax.

(3) By Chapter 18, Laws of Washington, 1891 (Rem. Rev. Stat., Sec. 8108). The State of Washington consented to the acquisition by purchase or by condemnation by the United States of America, of tracts, pieces, and parcels of land within the boundaries of the state for the sites of locks, dams, piers, breakwaters, keepers dwellings and other necessary structures and properties required in the improvements of the rivers of the State or bordering thereon, and ceded to the United States of America the jurisdiction of the State over all such land or lands as might be acquired by purchase or by condemnation or set apart by the general government for any of the purposes mentioned, [fol. 20] such consent being given in accordance with the 17th clause of the 8th section of the first Article of the Constitution of the United States and with the Acts of Congress in such cases made and provided. The United States acted under such consent and cession in acquiring lands

upon which are situated the Grand Coulee dam and power plant whereon the work required of plaintiffs under their aforesaid contract with the United States is in progress. Such action and acquisition constituted a contract between the State of Washington and the United States by which the United States became possessed of exclusive jurisdiction for taxation purposes over the lands so acquired, and plaintiffs, by reason of their contractual relation to the United States and the necessity for discharging their contractual obligations upon the lands so acquired by the United States, are entitled to the benefit of the contract. The imposition by the State of an occupation tax upon plaintiffs on account of the work they are doing upon the acquired lands would be to impair the obligation of the contract between the State of Washington and the United States in violation of Section 10 of Article 1 of the Constitution of the United States.

(4) Plaintiffs' business is being conducted, and all of its books, papers, records and data of whatsoever character relating to its contract with the United States and its doings thereunder are situated, upon lands acquired by the United States, with the consent of the State of Washington as aforesaid, for the construction of the Grand Coulee dam and power plant. To compel the production of their books, papers, records and data respecting their transactions with the United States, and to impose a tax upon them because of the discharge of their contractual obligations to the United States upon the lands so acquired, would be to deprive plaintiffs of their liberty and property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 21] Plaintiffs specially set up and claim the protection of the Constitution of the United States and of its several provisions referred to, both those inherent and instinct in the Constitution and those expressly stated, from the proposed unwarrantable encroachments and trespasses of the Tax Commission.

12. Plaintiffs allege that the acts and threatened acts of the Tax Commission are, for the reasons heretofore stated, an attempt to deprive plaintiffs of their liberty and property without due process of law, in violation of Section 3 of Article 1, of the Constitution of the State of Washington, and the effect which the Commission seeks to give to Chap-

ters 191 and 57 aforesaid is to make them laws impairing the obligation of contracts in violation of Section 23 of Article 1 of the Constitution of the State of Washington. Plaintiffs claim the protection of those sections from the unwarranted acts and threatened acts of the Tax Commission.

Wherefore, plaintiffs pray that it may be adjudged and decreed that plaintiffs are not subject to the payment of an occupation tax under the provisions of Chapters 191 and 57, Laws of Washington 1933, referred to in the complaint, on account of the compensation paid them under their contract with the United States for the construction of the Grand Coulee dam and power plant of the Columbia Basin project, or otherwise; that defendants, and each of them, be restrained and enjoined from taking any steps to compel plaintiffs to produce their books, papers, records or any other data regarding their contract with the United States for the construction of the dam and power plant, or from summoning plaintiffs or their officers to appear and testify concerning such matters, or from compelling plaintiffs to make returns showing their income for purposes of taxation under the chapters aforesaid, and from taking any other step or doing any other thing looking to the laying of an occupation tax upon plaintiffs under [fol. 22] said chapters. And plaintiffs pray such other and further relief as may be meet and equitable in the premises.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

Duly sworn to by W. G. Graves. Jurat omitted in printing.

[fol. 23] EXHIBIT "I" TO AMENDED COMPLAINT

Resolution by Special Board for Public Works

Whereas the President, under authority of Section 202 of the National Industrial Recovery Act, has directed the Administrator to include in the comprehensive program of public works contemplated by said section the Grand Coulee Dam Project on the Columbia River in the State of Washington.

Resolved that the Special Board include said project in the program and that the sum of $63,000,000 be allotted to said project to be expended by the Bureau of Reclamation, Department of the Interior, in accordance with the terms of a contract satisfactory to the Administrator between the United States and the State of Washington, or its duly authorized agency.

Adopted July 27, 1933.

[fol. 24] EXHIBIT "2" TO AMENDED COMPLAINT

Resolution by Special Board for Public Works

Subject: Allotment and transfer to Bureau of Reclamation, Department of the Interior, of $1,000,000 toward the construction of the Grand Coulee Dam project.

Whereas the Administrator and this Board of July 17 included in the comprehensive program the Grand Coulee Dam Project in the State of Washington and allotted $63,000,000 to the Bureau of Reclamation for its accomplishment, subject to a contract satisfactory to the Administrator between the United States and the State of Washington and/or its duly authorized agency, and it is now desired to hasten the accomplishment of said project and to provide the sum of $1,000,000 to finance the construction of working quarters and facilities for engineers and other employees of the Bureau of Reclamation engaged in preliminary investigation and preparation of plans and specifications for the dam and for the erection of a bridge across the Columbia river at the site of the dam, to enable work to be carried on, on both sides of the river:

Resolved that the sum of $1,000,000 of said allotment of $63,000,000 be transferred to said Bureau to finance said project in the respects stated, and that such expenditures thereof as may be made by the said Bureau shall be reimbursed to the United States by said State and the contract between the United States and the State of Washington or its duly authorized agency shall so provide.

Adopted September 12, 1933.

[fol. 25] EXHIBIT "3" TO AMENDED COMPLAINT

Resolution for Special Board

Subject: Reduction of allotment and transfer to Reclamation Bureau for the construction of the Grand Coulee project.

Whereas there has hitherto been allotted and transferred to the Reclamation Bureau, Department of the Interior, $63,000,000 for the construction of the Grand Coulee Dam project, and

Whereas it now appears that not to exceed $15,000,000 will be expended prior to January 1, 1935:

Resolved that the Administrator and this Board reconsider the transfer of $63,000,000 for the said project and transfer only the sum of $15,000,000.

October 16, 1933.

HTH.

[fol. 26] EXHIBIT "4" TO AMENDED COMPLAINT

Resolution for Special Board

Subject: Financing Grand Coulee Project.

Whereas this Board has heretofore allotted and transferred to the Reclamation Bureau, Department of the Interior, the sum of $15,000,000 to aid in financing the Grand Coulee Dam project and the said allotment and transfer was subject to the execution of a contract with the State of Washington satisfactory to the Administrator, and by resolution of this board adopted September 12 the sum of $1,000,000 was transferred to the Bureau of Reclamation to finance the construction of working quarters and facilities for engineers and other employes of the Bureau engaged in preliminary investigation and preparation of plans and specifications and said transfer was made prior to the execution of the contract satisfactory to the Administrator but was to be treated as an advance to the State of Washington, and the Commissioner of the Bureau of Reclamation now requests the transfer of an additional $1,000,000 to provide for the excavation and disposal of materials overlying the foundations of the Grand Coulee Dam prior to the execution of the said contract and as an advance to the

State of Washington to be later reimbursed to the United States:

Resolved that an additional sum of $1,000,000 of said allotment of $15,000,000 be transferred to said Bureau to finance said project in the respects stated and that such expenditure thereof as may be made by said Bureau shall be reimbursed to the United States by said state, and that the contract between the United States and the said state or its duly authorized agency shall so provide.

October 24, 1933.

[fol. 27] EXHIBIT "5" TO AMENDED COMPLAINT

Resolution for Special Board

Subject: Reconsideration of resolutions dealing with the Grand Coulee project as a project of the State of Washington and the adoption of a resolution making said project a Federal project and financing certain preliminary work thereon.

Whereas the Administrator and this Board by resolution of July 27, 1933, included in the comprehensive program as a project of the State of Washington the Grand Coulee Dam project on the Columbia River in said State and allotted and transferred the sum of $63,000,000 to the Bureau of Reclamation, Department of the Interior, to finance it, subject to a contract satisfactory to the Administrator between the United States and the said State; and by resolution of September 12 authorized the Bureau to expend $1,000,000 of said sum to finance certain preliminary work, said expenditure to be reimbursed by the States; and by resolution of October 17, reconsidered said resolution of July 27 and allotted and transferred the sum of $15,000,000 toward financing said project, subject also to such contract; and by resolution of October 24, authorized the Bureau to expend an additional $1,000,000 to finance certain other preliminary work, said expenditure likewise to be reimbursed; and the President has now directed that said project be included in the comprehensive program of Federal Public Works and financed as such:

Resolved that the Administrator and this Board reconsider all of such resolutions, and, reconsideration thereof having been had,

Resolved, further, that said project be included in the comprehensive program of Federal Public Works and that the sum of $15,000,000 be allotted and transferred to the [fol. 28] Bureau of Reclamation, Department of the Interior, to finance the construction of working quarters and facilities for engineers and other employes engaged in the preliminary investigation and preparation of plans and specifications for the dam, to finance the erection of a bridge across the Columbia River at the dam site, and to finance the execution by contract or otherwise of such additional work as the Director of the Bureau of Reclamation may deem appropriate.

March 14, 1934.

HTH.

[fol. 29] EXHIBIT "6" TO AMENDED COMPLAINT

(Symbol 11r-728)

United States

Department of the Interior

Bureau of Reclamation

Columbia Basin Project, Washington

Contract Between the United States and the Columbia Basin Commission of the State of Washington, Providing for Investigations, Plans and Estimates for the Columbia River Dam

This contract made this 30th day of June, 1933, between The United States of America, herein styled the United States, represented by the Commissioner of the Bureau of Reclamation, under the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and the Columbia Basin Commission of the State of Washington as created by Chapter 81, Laws of Washington, 1933, herein styled the Commission.

Witnesseth;

2. Whereas, The United States and the Commission, separately and cooperatively, have heretofore conducted extensive investigations connected with the development of

the Columbia Basin Project, and more particularly in recent years, that plan of development contemplating the construction of a high dam in the Columbia River at the head of Grand Coulee, with pumping plants to deliver irrigation water to the head of an irrigation system contemplating the ultimate irrigation of about 1,200,000 acres, and

3. Whereas, under present economic conditions it may prove advisable to construct the Columbia River dam in two stages; the first stage to consist of a dam approximately 145 feet high above present low water with a power develop- [fol. 30] ment in connection therewith of approximately 700,000 installed horsepower and the second stage to consist of the raising and the completion of said low dam to an ultimate height of approximately 370 feet above low water or to a pool level of approximately 1287.5 feet above the sea, said low dam being useful in the ultimate construction of such high dam and enabling the development of a power market with a large reduction in initial investment and resulting carrying charges, and

4. Whereas, the Emergency Relief Commission created by chapter 8, Washington Laws 1933, did at a regular meeting duly held on June 29, 1933, unanimously adopted the following resolution:

"Whereas, Chapter 81, Laws of Washington, 1933, created a commission known as the Columbia Basin Commission having for its purpose the immediate development of the Columbia Basin project by means of the Grand Coulee Dam in the Columbia River, and the adjacent power plant, having for one of its purposes the providing of employment for the unemployed in the existing emergency, and

"Whereas, The United States of America, represented by the Commissioner of the Bureau of Reclamation has indicated willingness to contract for and proceed with the preliminary investigation and engineering necessary to the issuance of license, preparation of plans, and letting of contract for actual construction work on the said project, and

"Whereas, the said preliminary work and investigation will require a large amount of actual labor on the ground as well as office engineering work and will involve an expense estimated in the sum of not to exceed $377,000.00 and will be an important factor in relieving present unemployment in the state of Washington, both in the preliminary work and

in the possibility thereby produced of large construction work thereafter, and

"Whereas, the Columbia Basin Commission is not provided with funds or authority to expend funds or pledge credit or make any contract, involving financial commitments against the state of Washington, and

"Whereas, the Emergency Relief Commission is authorized and directed to cooperate with existing agencies either national, state or local for the purpose of carrying out its functions, and

"Whereas, both the preliminary work referred to herein and the Grand Coulee Dam project and power development are in fu-therance of the duties, plans and purposes of the Emergency Relief Commission and of the Columbia Basin Commission.

[fol. 31] "Now Therefore be it Resolved by the Emergency Relief Commission of the State of Washington that in fu-therance of its duties, ends and purposes and in accordance with the powers conferred upon it, the Emergency Relief Commission of the state of Washington does hereby make and constitute the Columbia Basin Commission an agency for the carrying out of the plans, duties and purposes of this commission to the extent hereinafter provided; and does hereby authorize and direct the Columbia Basin Commission and confer upon it the power to expend funds as herein appropriated and to make contracts as herein provided, in furtherance of the powers conferred upon the two commissions herein referred to.

"Be it Further Resolved that the Emergency Relief Commission does hereby allocate and appropriate to the Columbia Basin Commission the sum of $377,000.00, or so much thereof as may be necessary, to be used by the Columbia Basin Commission in meeting the obligations of that certain contract proposed to be enacted into by it with the United States of America, represented by the Commissioner of the Bureau of Reclamation; and the Emergency Relief Commission does hereby authorize and direct *and direct* that all other contracts necessary, incident and proper in furtherance of the general objects and purposes herein set forth, and the execution thereof by said Columbia Basin Commission shall be as valid and binding on the Emergency Relief Commission as if executed in the name of the Emergency Relief Commission itself, and as to all things

done under said contract and pursuant to this resolution the said Columbia Basin Commission shall be and is constituted an agency of this Commission and shall act both on its own behalf and under its own powers and also as an agency of the Emergency Relief Commission."

5. Whereas, the Commission desires the United States to make the necessary investigations of the most economic and practical construction of the Columbia River Dam in two stages and to prepare construction plans, estimates and specifications enabling contracts to be let for the construction of said low dam at the earliest practicable date and is willing to advance the necessary funds to cover the cost of the work connected therewith:

6. Now Therefore, The United States will, upon execution of this contract, proceed with the work herein contemplated, which work among other things, will include:

(a) Topographic surveys in the vicinity of the dam site.

(b) Investigation of concrete aggregates including tests for strength and suitability and determination of location and quantity available.

(c) Exploration of foundations at the dame site by drilling and test pits, it being agreed that said dam site shall be at the head of Grand Coulee in the Columbia River.

[fol. 32] (d) Designs and estimates for the low dam and power plant, with particular attention to adaptation of the dam to future raising to a pool elevation of approximately 1287.5 feet above sea level as contemplated in the reports by the chief engineer of the Bureau of Reclamation and by the Chief of Engineers of the United States Army, the work to include such studies and investigations of the designs of both the low and high dams as to secure development in two stages in the most practicable and economic manner.

(e) Preparations of designs and specifications for construction of the low dam and power plant.

(f) Investigation of power markets.

The items enumerated are not intended to represent the entire scope of the work contemplated by this contract, the extent and character of which will be governed by mutual agreement during the progress of the operations under this

contract and which may include services in matters connected with the perfecting of the plans of the Commission for the construction of the Columbia River Dam, including representations before the Federal Power Commission and other governmental bodies, having to do with the development of the natural resources of the country.

7. It is agreed that the United States Reclamation Service will inform a board of consulting engineers, consisting of three members appointed by the Columbia Basin Commission with the approval of the Governor, of the progress of the plans for the work to be done under this contract and consult with said board of engineers from time to time as the work progresses, it being understood that the United States Reclamation Service shall have final authority in determination of all plans for work done.

8. In all matters connected with the interpretation, modification or enlargement of this contract the Commission shall, when authority therefor is given in writing by the Commission, be represented by the Director of Conservation and Development or other duly authorized representative or representatives.

9, The work shall be under the direction of the Com- [fol. 33] missioner and the Chief Engineer of the Bureau of Reclamation and all employes engaged by the United States on these investigations, except as otherwise provided herein, shall be subject to the established rules and regulations of the United States Civil Service Commission. When mutually agreeable, persons may be employed for the work under this contract without regard to civil service status, either as to the United States or the State, and when so employed, shall be compensated by the Commission both as to salary or wages and expenses and the Commission shall be liable for any claims that may arise out of the employment of such persons, whose employment shall in any event cease when the work herein contemplated is completed. When desirable in the interest of efficiency and saving of time, supplies and services other than labor may be furnished by the Commission at its own expense.

10. During the progress of the work the Commission will insofar as requests are made therefor, and subject to the availability of funds, be supplied with reproductions of

any plans, surveys and studies that may be conducted pursuant to this contract. The originals of all data, designs, plans, estimates and studies resulting from these investigations shall remain in the custody of the Bureau of Reclamation in the office of its Chief Engineer; provided, however, that in the event construction of the Columbia River Dam shall be undertaken in behalf of the Commission by any agency other than the Bureau of Reclamation, such records shall then upon request of the Commission be relinquished to the Commission, but the Bureau of Reclamation may retain copies thereof.

11. The gross expenditure contemplated by this contract shall be limited to Three Hundred Seventy-seven thousand dollars ($377,000.00). The Commission will upon execution of this contract deposit with the Special Fiscal Agent of the Bureau of Reclamation at Denver, Colorado, fifty thousand dollars ($50,000). Additional sums will be deposited [fol. 34] from time to time by the Commission as requested by the representatives of the United States, but the United States shall cease work under this contract whenever funds advanced therefor are exhausted. The cost of the work will include payments for field expenses and personnel, consulting and other services, and general expense of the Bureau of Reclamation. There shall also be charged against such advances, expenditures that have been made by the United States since April 1, 1933, for the cost estimate of the low dam and for maps and plans prepared in connection with applications made before the Federal Power Commission. Upon completion of the work, or in the event the same shall be terminated prior thereto, either because of lack of funds or by mutual agreement between the United States and the Commission, the United States will refund to the Commission the remainder, if any, of the funds deposited by the Commission after all outstanding liabilities shall have been liquidated.

12. The United States will, other conditions being equal, in the conduct of the work, give preference in employment to individuals, engineers and concerns resident in the State of Washington.

13. No member of, or delegate to Congress, or resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. Noth-

ing, however, herein contained, shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties have hereunto signed their names the day and year first above written.

The United States of America, by Elwood Mead, Commissioner, Bureau of Reclamation. The Columbia Basin Commission, by E. F. Banker, Chairman.

Attest: James O'Sullivan, Secretary of Commission.
Approved: The Emergency Relief Commission, by Frank S. Baker, Chairman. (Seal.)

[fol. 35] EXHIBIT "7" TO AMENDED COMPLAINT.

(P. O. Draft; Oct. 20, 1933)

United States,

Department of the Interior,

Bureau of Reclamation

Grand Coulee Project, Washington

Contract Between the United States of America and the State of Washington Acting Through the Columbia Basin Commission

This Agreement, made this first day of November, 1933, in pursuance of the act of June 17, 1902, (32 Stat., 388) and acts amendatory thereof or supplementary thereto, referred to herein as the Reclamation Laws, and of the act of June 16, 1933 (48 Stat., 125) commonly known as the National Industrial Recovery Act, between the United States of America, represented by the Secretary of the Interior, and the State of Washington, represented by that certain agency of the said state known as the Columbia Basin Commission, created under Chapter 81 of the 1933 Washington Laws.

Witnesseth That:

2. Whereas brevity is desirable, the following are hereinafter styled as listed in Column 1 hereof, in lieu of the full name or title listed in column 2 hereof:

Column 1	Column 2
United States	United States of America
Secretary	Secretary of the Interior
NIRA	National Industrial Recovery Act
State	State of Washington
Commission	Columbia Basin Commission
Project	Grand Coulee Project

and

[fol. 36] 3. Whereas, an allotment of $63,000,000 out of the fund appropriated under the NIRA has been made available for the construction of a dam and power plant by the Reclamation Bureau at the Grand Coulee site on the Columbia River in the said state and such transmission lines in connection therewith as may be found necessary or desirable;

4. Whereas, the said dam to be constructed with said allotment constitutes the first unit and an integral part of a larger Grand Coulee Dam which is more fully described in the reports of the Chief of Engineers of the War Department and the Reclamation Bureau as set out and discussed in the "Hearings before the Committee on Irrigation and Reclamation of the House of Representatives of the Seventy-second Congress on the Columbia Basin Project, H. R. 7446", which said dam will provide about 5,000,000 acre-feet of storage capacity, create a lake 151 miles long extending from the Grand Coulee to the Canadian line, and serve as the diversion dam for said project and for improvement of navigation, flood control, power development, and ultimately for irrigation, including the irrigation of public lands of the United States; and

5. Whereas, under appropropriation made for that purpose by Congress, the Corps of Engineers, United States Army, have conducted exhaustive investigations of the Columbia River for the purpose of determining the best use of the said stream and its tributaries for the various purposes to which it is adapted, and have adopted a comprehensive and coordinate plan for the development and use of said stream for navigation, flood control and irrigation and for the development of electrical energy to pay the cost of the proposed construction and for irrigation pumping and industrial and domestic use; and

[fol. 37] 6. Whereas, the said comprehensive plan for the co-ordinated development of the Columbia River for navigation, flood control, power and irrigation includes the construction of a series of dams at various points on the Columbia River, the uppermost of which is the said Grand Coulee Dam; and

7. Whereas, the said Grand Coulee dam is the key structure in the comprehensive plan for the coordinated development of the said stream, in that the said Grand Coulee Dam will provide the necessary storage capacity to store the peaks of the Columbia River floods and, by storing the floods and releasing the stored water during the low water season, will improve the flow of said stream for navigation, power development and irrigation and will reduce the flood dangers on the lower part of the stream; and

8. Whereas, it is estimated that the storage to be made available behind the said Grand Coulee dam will about double the amount of firm power which can be developed at each of the proposed dam sites between the Grand Coulee and the mouth of the Snake river and will increase by about 50% the amount of firm power that can be developed at each of the several dam sites below the mouth of the Snake; and

9. Whereas, the said increased amount of firm power made possible at each of said lower dams by reason of the storage behind the Grand Coulee dam is an important factor in the feasibility of each of said lower dams as a self-liquidating project; and

10. Whereas, the said Commission has been created by the Legislature of said state as a state agency for the purpose of cooperation with the federal government in securing the construction of the said project and the said Grand Coulee dam;

Now, therefore, it is hereby agreed:

[fol. 38] 11. Construction of First Unit.—Upon approval of the plans and specifications for the said proposed first unit dam of the project by the chief engineer of the reclamation bureau, the United States acting through the Reclamation Bureau and under the direction of the secretary will expend the sum of sixty million dollars ($60,000,000) or so much thereof as the secretary shall find to be necessary for

that purpose, in the construction of a dam and power plant at the said Grand Coulee site, the top of which dam will be approximately at elevation 1116, and spillway crest thereof, at approximately elevation 1085 feet above sea level, and will expend the sum of three million dollars ($3,000,000) or so much thereof as the secretary shall find to be necessary or advisable in the construction of transmission lines for the marketing of the electrical energy to be produced at said dam.

12. Title to Constructed Works.—The United States will retain the title to the said dam and power plant and the operation and control thereof until the cost of the said project, including the cost of the said first unit dam and power plant, has been fully repaid into the treasury of the United States.

13. Commission to Act in Advisory Capacity.—The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.

14. Option to State.—The State, acting through the said Commission, or other duly authorized state agency, shall have an option, for a period of three and one-half (3½) years from the date hereof, to purchase the perpetual right to the entire power output of the said first unit dam and power plant by issuing and delivering to the United States valid general obligation bonds of the State in the amount of seventy per cent (70%) of the estimated cost of the said [fol. 39] first unit dam, power plant and transmission lines as the said cost is estimated and announced by the secretary in the manner hereinafter provided, subject, however, to the following terms, conditions and reservations. The principal of the said bonds shall come due in not to exceed 30 years and shall bear interest at the rate of four per cent (4%) per annum. It is further agreed that for a period of five years after the expiration of said three and one-half (3½) years option period, the state shall have a further and additional option to purchase the said perpetual right to the entire power output of said first unit dam and power plant at the same price and upon the same terms and conditions applicable to said 3½ year option; but subject to

the additional condition, that if the state should exercise the option after the expiration of said 3½ year period, then the state will take said power rights subject to any contracts for the sale of power from said plant which the United States may have made prior to the exercise of the option by the state and the rights, benefits, duties and obligations of the United States under such previously made power sale contracts shall inure to the benefit of and be binding upon the state as the successor of the United States thereunder.

15. Estimate of Cost of First Unit.—When the Commission shall have advised the secretary that the necessary legal authority has been secured to issue and deliver the said bonds and that the state desires to exercise the option provided for herein, the secretary will furnish the commission an estimate of the cost of the first said unit dam and power plant and the transmission lines to be constructed in connection therewith, based upon the costs theretofore incurred plus an estimate of the cost of completing the said works, which statement and estimate of cost shall include all expenditures of whatsoever kind in connection with, growing out of, or resulting from the work described, including the cost of labor, material, equipment, engineering and legal [fol. 40] work, superintendence, administration and overhead, right of way, property, and damage of all kinds, shall include all sums expended by the United States in surveys and investigations, both prior to and after the execution of this contract. The said estimate shall be in writing, duly signed by the secretary, and shall be conclusive for the purpose of the option provided for herein.

16. Enlargement, Alteration or Improvement of Works.—The United States reserves the right to enlarge, alter and improve the said first unit dam and to enlarge, alter, improve and modify the said power plant and to change the machinery therein to adapt the same to the higher head available from such enlarged dam, and to add other or additional power plants or power units, and the right to use the enlarged dam and the enlarged or modified power plant in connection therewith for all the purposes for which said larger dam is intended, including improvement of navigation, flood control, power development, and irrigation.

17. Right to Seasonal Power.—The United States reserves the right to such part of the seasonal power available from

said enlarged dam during the irrigation season as may be needed for pumping water for the said project.

18. Estimate of Available Power.—In connection with the said estimate of cost to be furnished by the secretary, the secretary will also furnish as estimate of the amount of firm power and the amount of seasonal power which may reasonably be expected from said first unit dam and power plant, and after the construction of the enlarged dam and the improved or enlarged power plant the United States retains the right to all power or electrical energy which can be developed at said enlarged dam and power plant in excess of said estimate of power available from said first unit dam and power plant and after said enlargement the power rights of the state will be limited to the said estimated power output [fol. 41] estimated to be available from said first unit dam and power plant; but it is agreed and understood that enough of the seasonal power available from said enlarged dam and power plant during the irrigation season to supply the pumping requirements of the project is reserved by the United States even though such reservation should encroach somewhat upon the estimated seasonal power output of said first unit dam and power plant.

19. Payment of Operation and Maintenance.—If the state exercises the option herein granted and acquires the right to the power output of said first unit dam and power plant, the state will each year, in addition to the payment of the principal and interest provided in said bonds, pay to the United States the cost of the operation and maintenance of the said first unit dam and power plant and transmission lines in connection therewith, as set out and determined by a statement of such cost to be furnished each year by the secretary to the commission until the enlargement of the said dam and power plant; and after the enlargement of said dam and power plant will pay a proportionate part of the cost of the operation and maintenance of the said enlarged dam and power plant, in proportion to the number of kilowatt hours of electrical energy secured by the United States and the state respectively from the said enlarged dam and power plant, and also a proportionate part of the cost of the operation and maintenance of such transmission lines as are used jointly by the United States and the state in proportion to the amount of electrical energy transmitted over such lines by each party. The said operation and

maintenance charges shall be determined and paid in the following manner.

On or before December 1st of each year after the state has exercised the option granted herein and after power has become available from said first unit dam, the secretary will furnish the commission an advance estimate of the probable cost of the operation and maintenance of the said dam, power plant and transmission lines for the coming [fol. 42] calendar year from January 1 to December 31, inclusive, following next after the date of said estimate, and after the enlargement of said dam and power plant will also include in said advance estimate an estimate of the state's proper pro rata share of such operation and maintenance cost and expense according to the proportion herein provided for, which cost shall include all the elements of cost listed in article 15 hereof, and on or before January 1 following the date of said estimate, the state will pay to the United States the amount of the said estimated cost of operation and maintenance chargeable to the state as shown by and set out in said advance estimate, which shall be considered conclusive for this purpose.

Within ninety (90) days after the close of the year for which such payment has been made on such advance estimate basis, the secretary will furnish the commission a statement of the actual cost and expense of such operation and maintenance for the said past year, including all of the items of expense listed in article 15 hereof, and after the enlargement of said dam and power plant will also include in said statement a statement of the state's proper pro rata share of said operation and maintenance cost, which statement by the secretary shall be considered conclusive for the purposes of this contract.

Within thirty (30) days after delivery of such statement of actual cost and expense of said operation and maintenance during the preceding year, the state will pay to the United States, or the United States will refund or credit to the state, such amount of money so that the total amount paid by the state to the United States as finally adjusted for each year's operation and maintenance of said works shall be the actual cost of the operation and maintenance of said works as shown by the said statement of actual cost up to the time of the enlargement of said dam and power

plant, and after the enlargement shall be the state's proper [fol. 43] pro rata share of such actual cost as shown by said statement of actual cost.

20. Interest on Overdue Payments.—All charges herein agreed to be paid by the state to the United States which are not paid when due shall bear interest from the due date thereof until paid at the rate of six per cent (6%) per annum.

21. Default in Payment.—Should the state after exercising the option provided for herein, default in the payment of the principal or interest of said bonds or any part thereof, or any operation and maintenance charge herein agreed to be paid, the United States shall not be obliged to furnish any power to or from the state from said dam and power plant during the time that the state remains in default, and should such default continue more than two (2) years the United States may, at its option, by notice from the secretary to the Commission, terminate all rights of the state and of the commission in said dam, power plant and transmission lines, and all rights of the state and of the commission under this contract as fully and completely as if this contract had never been made, but after such termination shall return said bonds to the state upon the payment by the state of all interest accrued thereon up to that time and all past due indebtedness of the state to the United States for operation and maintenance charges.

22. Rights if State Fails to Exercise Option.—Should the State decide not to exercise the option herein granted or allow the said option periods from the date thereof to elapse without the exercise of said option, the United States shall retain all rights in the said dam, power plant and transmission line and the power output thereof and the right to use, distribute, sell or dispose of all electrical energy developed at said dam and power plant in such manner as the United States may deem best to pay the cost of the said project and accomplish the other purposes for which said project is intended.

23. United States not Liable for Damages.—The United [fol. 44] States, its officers, agents or employees shall not be liable for damages when, for any reason, suspensions of the operation of the power system of the United States, or any part thereof, interfere with the delivery of electrical

energy to the commission. The United States shall have the right to shut down its power plant and/or transmission lines and to cease the delivery of electrical energy temporarily whenever it shall be necessary to make repairs, replacements or additions to its power plant, transmission lines, substations, dams or canals. Whenever possible, the United States will give reasonable advance notice of such temporary suspensions of service and will make all such repairs, replacements, and additions with diligence and will resume service without undue delay.

24. Rules and Regulations by Secretary.—The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dams, power plants and transmission lines and which are not expressly determined by law or the terms of this contract, and his decisions on such questions shall be conclusive.

25. Officials not to Benefit.—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

United States of America, by —— ——, Secretary of [fol. 45] the Interior. State of Washington, by The Columbia Basin Commission, by —— ——, Chairman, by —— ——, Secretary.

Attest: —— ——. (Seal.)

[fol. 46] EXHIBIT "8" TO AMENDED COMPLAINT

This Contract made and entered into this — day of September 1934, by and between Silas Mason Company, Inc., a corporation organized and existing under the laws of the State of Delaware, Walsh Construction Company, a corporation organized under the laws of the State of Iowa, and

Guy F. Atkinson, George H. Atkinson, W. E. Kier and E. L. Kier, partners, doing business under the firm name of Atkinson-Kier Co. (hereinafter referred to as the Contractors"), and Mason-Walsh-Atkinson-Kier Company, a corporation organized under the laws of the State of Delaware (hereinafter referred to as the "Agent"), Witnesseth:

Whereas, the contractors under date of June 18, 1934, made and submitted to the Government of the United States their joint bid for the construction of what is known as the Grand Coulee Dam and Power Plant in the State of Washington, together with such other work in connection therewith indicated on the drawings accompanying said bid or required by the specifications pertaining thereto, and such incidental work as needed or required in writing by the contracting officer; and

Whereas, said joint bid so submitted by the Contractors was the lowest bid submitted, and was approved and accepted by R. F. Walter, Chief Engineer, Reclamation Bureau, on July 16, 1934, notice of which acceptance was given to the Contractors by telegram dated July 16, 1934, received by the Contractors on July 17, 1934; and

Whereas, the Contractors propose to execute the formal contract for the prosecution of said work designated as P. W. A. 51, and wish to prosecute said work to completion without any assignment of the contract obligations; and

Whereas, the Agent desires to act as the Agent of the Contractors in carrying out the said contract and in furnishing the necessary labor and materials in connection therewith, but not in any way as the assignee of said contract or as [fol. 47] having any interest therein; and

Whereas, the Agent is a corporation, the control of which is vested or is proposed to be vested through stock ownership held by said Contractors, and the executive officers of the Agent have been selected from the executive officers of the Contractors, and it is intended that the prosecution of said work shall be under the control and direction of the Contractors;

Now, Therefore, this Agreement Witnesseth: That the Contractors agree to constitute, appoint and employ the Agent in the prosecution of all work necessary to be done in the fulfillment of the contract described in the preamble hereof, and the Agent agrees to furnish working capital necessary for the performance of the contract and also to provide funds or securities as may be necessary for and

make deposit in escrow thereof for the indemnification of the sureties on the bond for the faithful performance of the contract and to do all things necessary to carry out said contract according to the true meaning and intent thereof, and to furnish all necessary labor and materials to fulfill and carry out said contract within the time specified therein and in accordance with the plans and specifications thereof and to pay all costs and expenses of every kind and nature incident to the complete fulfillment thereof

In Consideration Therefor the Contractors agree to pay the Agent as remittances are received from the Government of the United States by said Contractors, sums equal to the amouuts of such remittances for work done under said contract, such payments to be made by the Contractors forthwith upon their Receipt from the Government of the United States. It being intended that there shall be paid to the Agent in discharge of its obligations hereunder, sums aggregating the total consideration received by the Contractors from the Government of the United States in payment for and in fulfillment of their obligations under the aforesaid contract, diminished however, by any offsets, penalties or diminutions in the contract price from whatsoever cause. [fol. 48] The Agent shall make all disbursements for all costs and expenses incident to the carrying out of the aforesaid contract, and shall render a true accounting thereof to the Contractors upon demand. Any excess of the remittances received by the Agent, pursuant to the provisions hereof, over and above the costs and disbursements incident to the performance by the Agent of its obligations hereunder shall be and remain the property of the Agent.

The Contractors hereby designate the Treasurer of the Agent as their agent for the purpose of receiving from the Government of the United States in the name of the Contractors all monies due upon the aforesaid contract, and the executives of the Agent shall act as the agents and representatives of the Contractors in reference to all transactions by the contractors and the Government of the United States in connection with the aforesaid contract.

Nothing herein shall be construed to effect an assignment of the aforesaid contract by said Contractors or the relinquishment in any manner whatsoever of their obligations thereunder.

In Witness Whereof the corporate parties have caused this agreement to be executed by their duly authorized

officers and their corporate seals to be affixed by like authority and the copartnership party has caused this agreement to be executed by one of the partners and sealed, the day and year first above written.

Silas Mason Company, Inc., by —— ——. Walsh Construction Company, by ——. ——.

Attest: —— ——.

Attest: —— ——.

[fol. 49] Atkinson-Kier Co., by —— ——, a Copartner. (L. S.) Mason-Walsh-Atkinson-Kier Company, by —— ——.

Attest: —— ——.

[fol. 50] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER TO FIRST AMENDED COMPLAINT—Filed October 29, 1935

Come now defendants above named and answering plaintiffs' first amended complaint allege:

I

Referring to paragraph one thereof defendants admit that Silas B. Mason Company, Inc., is a Delaware corporation and that Walsh Construction Company is an Iowa corporation but allege that both of these corporations carry on within the State of Washington the business for which they are organized; that neither of said corporations have qualified to transact such business within the State of Washington and that neither of said corporations have paid to the State of Washington the fees required so to qualify; that said Silas B. Mason is an officer to the Silas Mason Company, Inc., representing said company in the state of Washington; that said Silas B. Mason is and has been a resident of the state of Washington; that T. J. Walsh is an officer of the Walsh Construction Company, a corporation, representing said company in the State of Washington; That said T. J. Walsh is and has been a resident of the state of Washington.

[fol. 51] Defendants admit that Atkinson-Kier Company is a copartnership consisting of Guy F. Atkinson and George H. Atkinson, William E. Kier and Elmer L. Kier and that Guy F. Atkinson is and has been a resident of the state of Washington and that the performance of the work under the contract referred to in paragraph six of plaintiffs' amended complaint was commenced in the state of Washington by said Guy F. Atkinson under the name and style of Guy F. Atkinson Company, prior to the organization of Mason-Walsh-Atkinson-Kier Company, a corporation.

That on or about the 10th day of October, 1934, Silas B. Mason, T. J. Walsh, Guy F. Atkinson and W. A. Hanger, describing themselves as residents of the state of Washington with offices in the Peyton Building at Spokane, Washington, organized the "Coulee Trading Company", a Washington corporation for the purpose of operating a general store at Mason City in Grant County and at other points in the state of Washington and that said corporation is now in good standing.

Defendants admit that Mason-Walsh-Atkinson-Kier Company is a Delaware corporation and that the same has qualified to do business in the State of Washington and has paid its annual license fee last due to the state of Washington. In this respect the allegations of paragraph eight of defendants' answer to plaintiffs' original complaint while true and correct at the time pleaded, are not now correct. The Mason-Walsh-Atkinson-Kier Company paid its first license fee on the basis of a $500,000 capitalization only, but it has paid its last annual license fee on its total capitalization of $5,000,000 which is the correct basis. The State of Washington asserts no further claim against the said corporation and the Mason-Walsh-Atkinson-Kier Company is entitled to do business in the state of Washington.

That Silas Mason Company, Inc., Walsh Construction Company and Mason-Walsh-Atkinson-Kier Company, originally commenced to do business in the state of Washington [fol. 52] with offices at 342 Peyton Building, Spokane, Washington, where said corporations transacted their business until their offices were moved nearer the damsite and it is alleged on information and belief that their offices are situated in Mason City, Washington.

That it was necessary for each of said corporations to

transact business in the state of Washington from their Spokane offices before actual construction work could be commenced at the damsite and that since the actual construction work has commenced the activities of each of said corporations have been necessarily confined to the state of Washington with the exception of the letting of sub-contracts for or the purchase of materials and equipment outside of the state of Washington but that even in this respect the said corporations were required by the terms of the contract and actually did confine their purchases to the state of Washington and did distribute them as generally as possible over the entire state.

II

Referring to paragraph 7 thereof defendants allege on information and belief that certain work was done in connection with the performance of the contract referred to by Guy F. Atkinson Company, prior to the formation of plaintiff Mason-Walsh-Atkinson-Kier Company, a corporation.

III

That the contract involved in this case was executed on behalf of the United States of America by R. F. Walter, Chief Engineer of the Bureau of Reclamation of the department of the interior and is the standard unit price contract used by the government in contract work and that under said contract plaintiffs are independent contractors.

[fol. 53] That some of the provisions of the contract and specifications are referred to in paragraph eight of plaintiffs' first amended complaint. That defendants desire the contract, specifications and provisions to be considered as a whole; that all of the provisions and specifications of the said contract are general and such as are used by the government in all instances where the relation of independent contractor was to be created.

Defendants call the court's attention to the following specific provisions of the contract for the purpose of showing that the federal government required the contractors to be subject to the jurisdiction of the state of Washington.

(a) Article 10 on page 5 of the contract requires the contractor to obtain all required licenses and permits. Among

other licenses plaintiffs actually and necessarily obtained licenses and permits from the state of Washington, through its department of licenses, for the operation of its oversized equipment on state highways and plaintiff Mason-Walsh-Atkinson-Kier Company obtained a distributor's license for use at Mason City from the Washington State Liquor Control Board.

(b) Article 21 on page 7 of the contract involved in this case which is form No. PWA 51 and which was executed on July 16, 1934, is as follows:

"Compensation Insurance.—The contractor will furnish compensation insurance for employees on this work and comply with the workman's compensation laws of the state, territory, or district in which the work is to be performed, and will give proof of such adequate insurance satisfactory to the contracting officer."

On July 19, 1934, a bulletin embodying certain changes in contract form No. PWA 51, was issued by Harold S. Ickes, administrator of the Federal Emergency Relief Administration of Public Works. This order provides:

[fol. 54] "The following will be substituted for article 21:

" 'Compensation Insurance.—The contractor shall provide adequate workmen's compensation insurance for all labor employed on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the contracting officer shall be given.' "

That plaintiff Mason-Walsh-Atkinson-Kier Company promptly qualified under the Washington Industrial Insurance Act and actually complied with said law by filing monthly pay-rolls and paying the monthly premiums and that Silas B. Mason, T. J. Walsh, Guy F. Atkinson, M. J. Whitson and W. A. Hanger, the officers of the Mason-Walsh-Atkinson-Kier Company have elected to come under the said act and are now covered by the Washington Industrial Insurance Act.

(c) Specifications promulgated by the Bureau of Reclamation in the Department of the Interior of the United

States, numbered 570, pertain to the Columbia Basin Project in the State of Washington and govern plaintiffs in the performance of their contract. These specifications are by this reference made a part of this answer.

(d) Specification No. 35 to be found on page 27 governs the construction of the contractor's camp. It contains the following statement:

"* * * Regardless of the approval of the contracting officer, the contractor shall comply with all the laws and regulations of the state of Washington or any agency or subdivision thereof, which affect the building, maintenance, or operation of the contractor's camp, and shall be responsible for any and all damages or claims resulting from inadequate or improper camp facilities. * * *"

This provision was incorporated in the specifications notwithstanding the fact that the government undertook to acquire the right of way for the construction of said camp (specification No. 4).

[fol. 55] (e) Specification No. 38, referring to Sewer and Sanitation, provides that the discharge of sewage into the Columbia River shall conform to the laws and regulations of the Department of Health for the state of Washington, and provides:

"* * * All garbage and refuse shall be regularly collected at such intervals as may be approved by the contracting officer or by the proper state of local regulatory authority, and shall be disposed of by burying, incineration, or otherwise as approved by the contracting officer."

(f) Specification No. 42, to be found on page 29, requires the contractor to make all necessary arrangements with the proper state and county authorities for school facilities and instruction for families of the contractors, employees and other residents in the camp site; This has been done and the state of Washington, through its proper department and subdivisions, actually maintains and has jurisdiction over proper schools in both the engineer's and contractor's camp.

(g) Specification No. 43, with reference to police protection, provides that police protection for the contractor's camp and the area involved in and surrounding the con-

struction work, will be furnished by the Washington State Patrol in cooperation with the government and the state of Washington, through its State Patrol in cooperation with county peace officers, have actually policed the entire area involved in and surrounding the construction work covered by the contract.

(h) Specification No. 50 refers to the locations of existing state roads in the vicinity of the work which are to be used by the contractor and the state of Washington through its department of highways, in cooperation with the proper county officials, has actually furnished and exercise complete jurisdiction over state roads leading to and from the damsite.

(i) Specification 51 requires the contractor to operate a railroad which was to be constructed by the Government from Odair to the damsite, a distance of about 30 miles [fol. 56] and the contractor is also required to transport materials either from or to Odair for either the government itself or other contractors engaged on any work which was a part of the Columbia Basin Project and the contractor was required to and did bid on such work, the transportation to be by truck over state highways prior to the completion of the railroad.

(j) Specification No. 52 refers to the substation of the Washington Water Power Company at Coulee City, Washington, as a possible source of electrical energy, the contractor being required to construct a transmission line from Coulee City to the damsite.

IV

Referring to paragraph 9 thereof, defendants admit that plaintiffs entered upon the performance of said contract and are now engaged in the performance thereof; admits that the actual co struction work is being done partially on lands acquired by the federal government from private parties with moneys made available under the National Industrial Recovery Act of 1933, but denies that the complete performance of the contract can be accomplished on said lands and alleges that the land upon which the completed structure will rest is a very small portion of the lands necessary for the authorized project. That the lands necessary for the entire project embraces a large amount of

public lands either owned by the government in its proprietary capacity or held in trust for Indians. That it includes a large amount of lands belonging to the state of Washington either held in fee or in trust for schools and that it also includes lands held by Lincoln and Ferry counties. That in order to carry out and perform the said contract plaintiffs did maintain offices and transact necessary business in Spokane county, Washington. That in order to carry out and perform said contract it was necessary for plaintiffs to operate special equipment over the highways of the state of Washington by special permit of the State of Washington. That while plaintiffs may not be [fol. 57] engaged in any other business than contracting the individual officers thereof have formed themselves into a corporation which is authorized to and does transact a general trading business in the state of Washington at Mason City, Washington.

V

Referring to paragraph 10 thereof defendants admit that plaintiffs are taxable in respect to their business of contracting under the provisions of Chapter 191, Laws of Washington for 1933, as amended by Chapter 57, Laws of Washington, ex sess. 1933, and that they are also so taxable under title II, chapter 180, Laws of 1935. Defendants admit that they have made demand for the payment of the tax but denies that the state of Washington will impose or attempt to impose upon plaintiffs any extraordinary remedies, pains or penalties which may be provided by any of said acts or which might in any way tend to hinder or embarrass plaintiffs in carrying out their said contract.

VI

Referring to paragraph 11 thereof defendants deny each and every allegation therein contained and allege that plaintiffs are acqually engaged in the business of contracting in the state of Washington; that the relationship existing between plaintiffs and the federal government is that of independent contractor and that plaintiffs are in no sense federal agencies but are engaged in a private business for gain; that the federal government holds the lands acquired by it from private parties in trust for the necessary carrying out of the completed project in its proprietary rather than its

governmental capacity and that the state has not abandoned jurisdiction over said lands nor has the federal government assumed jurisdiction over them.

VII

Defendants deny the allegations contained in paragraph 12 thereof.

[fol. 58]

VIII

That the state of Washington has assisted the federal government in acquiring lands for the said Columbia Basin Project and has performed certain work on said project and furnished moneys to the federal government to conduct other work; that the details of the activities of the state of Washington are set forth in the exhibits attached to plaintiffs' complaint and in the first and second reports of the Columbia Basin Commission of the State of Washington referred to in plaintiffs' complaint.

IX

That by reason of the carrying out of their said contract the plaintiff, Silas Mason Company, Inc., a Delaware corporation and plaintiff Walsh Construction Company, an Iowa corporation, are doing business in the state of Washington without having qualified so to do

Wherefore, having fully answered plaintiffs' amended complaint, defendants pray that the same may be dismissed and this court enter its decree declaring that plaintiffs are subject to the payment of the Washington Occupational Tax of the state of Washington under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933 ex. sess. and entitled to the tax under chapter 180, Laws of 1935, and that defendants have such other and further relief as may be proper in the premises.

—— ——, Attorney General. —— ——, Assistant Attorney General.

[fol. 59] *Duly sworn to by E. P. Donnelly. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 60] [File endorsement omitted]

[fol. 61] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

REPLY—Filed October 16, 1935

For reply to the defendant's answer plaintiffs

1. Deny the affirmative matter pleaded in paragraph III of said answer, except they admit that the Silas Mason Company Inc., Walsh Construction Company and Mason-Walsh-Atkinson-Kier Company had offices in the Peyton Building, Spokane, Washington, prior to the beginning of construction work on the dam, which is the subject of the contract pleaded in the complaint herein, and that from such offices they transacted such business as was necessary to be done while the arrangements were being made to commence work on the dam. In that respect they allege that they did no other business in such offices than such as was preliminary to beginning work under their contract.

2. Admit that the particular contractual provisions set forth in paragraph III of the answer were contained in the contract for the construction of the Grand Coulee Dam, which plaintiffs entered into, and that plaintiffs have performed such provisions in accordance with the terms of the [fol. 62] contract. Admit, also, that they have complied with such provisions of the police laws of the state of Washington as would affect citizens of that state other than those residing within the reservation ceded to the United States, which is pleaded in the complaint. Deny other affirmative matters pleaded in the third paragraph.

3. Deny the affirmative matter pleaded in paragraph IV of the answer save that plaintiffs admit they maintained offices in Spokane county, Washington, where business essential to beginning the construction of work under the dam contract was transacted, and admit that they have obtained such permits as were necessary for the operation of equipment over the highways of the state of Washington, and admit the formation of a corporation by individual officers of plaintiffs which is transacting a general trading business at Mason City, Washington. In respect of the last admission they allege that Mason City is situated within the

bounds of the reservation ceded to the United States by the state of Washington, as pleaded in the complaint.

4. Deny each and every allegation made and contained in paragraph VI of the answer.

5. Deny each and every allegation contained in the ninth paragraph of the answer.

Wherefore, plaintiffs pray as in their amended complaint.

Graves, Kizer & Graves, Attorneys for Plaintiffs.

[fol. 63] *Duly sworn to by W. G. Graves. Jurat omitted in printing.*

[fol. 64] IN SUPERIOR COURT OF THURSTON COUNTY

No. 15850

SILAS MASON, INC., et al., Plaintiffs,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON et al.

MEMO. OPINION—Filed November 18, 1935

This action was brought to enjoin the collection of a tax sought to be laid under the provisions of chapter 191 Laws of Washington, 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933. The tax in controversy is denominated in the original act as "an annual tax or excise for the privilege of engaging in business activities." The right to impose a tax upon plaintiffs is claimed under the Amendment Chapter 57, Laws of Extraordinary Session 1933, page 157, which provides for the collection of a tax measured by the gross income of business "from every person engaging or continuing within the State in the business of rendering or performing services."

Plaintiffs are citizens and residents of states other than Washington and are within this state for the sole purpose of performing the contract with the United States Government in the construction of Grand Coulee Dam and power plant, a part of the Public Works system of the United States embraced within what is known as the Columbia River project.

Plaintiff resists the enforcement of the tax for two reasons: First, because the contract is with the federal government and that the tax is a tax on the contract and therefore an attempt to tax a Federal instrumentality; second, [fol. 65] that the operations of the plaintiff are without the jurisdiction of the State, namely in territory ceded by the state to the Federal Government.

In support of the contention that the state cannot tax the contract with the United States, plaintiffs rely upon cases involving the tax upon leases of Indian oil lands.

Indian Oil Company v. Oklahoma, 240 U. S. 522;
Gillespie v. Oklahoma, 257 U. S. 501:

and other like cases;

Those cases in my judgment, are not in point. In those cases it was held that the imposition of the tax was upon property under the protection of the federal government; that the holders of the leases were agents of the government and that the tax was upon an instrumentality through which the United States was performing its duty to the Indians.

Plaintiffs also rely upon a line of cases in which attempts were made by the state to tax National Banks in their various activities beginning with the case of

McCulloch v. Maryland, 4 Wheaton, 316, and running through a long line of more recent cases. In all those cases the banks were held to be Federal agencies carrying out certain functions of the Federal Government.

In the case of Weston v. Charleston, 2-Pet. 448, for instance, the United States had borrowed money and had issued, as evidence of the debt, some form of obligation referred to as stock. The city of Charleston undertook to lay a tax upon the stock and it was held that it could not be done because it was a tax upon the power of the Government to borrow money.

While in all those bank cases, the relations between the government and the agencies attempted to be taxed are referred to as contracts, they, in a very definite sense, differ from the contract involved here. It is pointed out that the state may tax the property of the agent, but not its activities in carrying out the governmental functions.

[fol. 66] The agents of the government are only exempt from State legislation in so far as that legislation may in-

terfere with or impair their efficiency in performing the functions for which they are designed to serve.

First National Bank v. Kentucky, 9 Wall, 353.

The exemption is dependent, not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of the power to serve the Government as they were intended to serve it or does hamper the efficient exercise of their power.

Union Pacific Railroad Co. v. Peniston, 18 Wall, 36.

Plaintiffs here hold a contract for the purpose of performing certain construction work. It was obtained by competitive bids. It would be the same in every respect if it were entered into with a private person so far, as its purposes are concerned. They are independent contractors performing the work for a definite price which the Government has agreed to pay and they have agreed to accept for the work performed. The Government is in no way affected by the fact that they pay or do not pay the tax any more than the government could be affected by the payment of a tax upon their trunks or machinery. They do not fall within the class of cases upon which they rely.

In Trinity Farm Company v. Grosjean. 291 U. S., 466. a contractor with the government for the construction of levees on the Mississippi River was held to be an independent contractor and not a Government instrumentality, and that the tax upon the gas used in operation on the contract had only a consequential or remote effect upon the government.

Those cases relied upon by the plaintiffs deal with acts of officers or employees in the exercise of Governmental functions and the cases are unanimous in holding that in so act- [fol. 67] ing they are not subject to revenue or police laws of the state. The case of a corporation contractor for the construction of public works is one in which, if it may be said to be an instrumentality of the Government at all, its relations to the Government are nevertheless contractual. It does not exercise Government functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and

similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying.

The distinction endeavored to be made here is clearly demonstrated, I think, in a comparison of the Spruce Production Corporation case, Clallam County versus the United States, 263 U. S. 341, with the case at bar. There it was pointed out that the corporation was organized by the United States as an instrumentality for carrying on the war. The case at bar is one of a corporation having its own purposes, as well as those of the United States, and interested in profit on its own account.

In General Construction Company versus Fisher, 39 Pacific, 362, an Oregon case, plaintiff had entered into a contract with the United States Government to furnish labor and material for the construction of a dam and irrigation works in connection with an irrigation project in eastern Oregon. The state of Oregon had levied a tax upon the income of plaintiff from its operations. After reviewing the facts and numerous cases, the Supreme Court of Oregon concluded that the weight of authority would indicate that a corporation contracting with the United States or the State as an independent contractor for gain cannot claim immunity from taxation by reason of its furnishing labor and service either to the United States or the State unless some statute specifically exempts such contractor from taxation in regard to the particular contract involved.

[fol. 68] The exemption of an instrumentality of one Government from taxation by another must be given such practical construction as will not unduly impair the taxing power of the taxing government.

Susquehanna Power Company v. Commission of Maryland, 283 U. S. 291.

It seems clear to me from the authorities and the facts involved here that the plaintiffs are not in a position to claim exemption from the tax imposed by reason of the fact that they are a government instrumentality.

In considering the last contention of plaintiffs, it will be helpful to inquire into the various steps leading up to the contract here involved as shown by the exhibits set forth and attached to the complaint. First a reference to the act of Congress authorizing the construction, repairs and preservation of certain public works on rivers and harbors and

for other purposes, approved August 20th, 1935, should be noted. Section 2, of that Act, being H. R. 6732, Public Act No. 409, 74th Congress, provides that: "for the purpose of controlling floods improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian Reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as * * * and Grand Coulee Dam on the Columbia River, are hereby authorized and adopted and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate and maintain dams, structures, canals, and incidental works necessary to such projects, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified." This was the fed-
[fol. 69] eral authorization for the project with which we are dealing.

Exhibit 5, attached to the complaint is a copy of a resolution, the subject of which is a reconsideration of several former resolutions relative to the Grand Coulee Dam project as a project of the State of Washington and the adoption of a Resolution making said project a Federal project. This Resolution bears date March 14, 1934. It thus appears that the project was originally considered as a state and not as a federal project.

Exhibit 7 attached to the Complaint is a copy of the contract between the United States and the state of Washington acting through the Columbia Basin Commission dated November 1, 1933. This contract is entered into in pursuance of certain acts of Congress referred to as the Reclamation Laws and of the Act of June 16, 1933 (48 Stat. 125) commonly knows as the National Industrial Recovery Act. After referreing to the allotment of $63,000,000 for the construction of a dam and power plant by the Reclamation Bureau at the Grand Coulee site on the Columbia River and that the dam will provide about 5,000,000 acre feet of storage capacity, create a lake of 150 miles long and serve as a diversion dam for said project and for improvement of navigation, flood control, power development and for irriga-

tion, this contract further provides in Section 12 entitled "Title to Constructed Works" as follows: "The United States will retain the title of said dam and power plant and the operation and control thereof until the cost of said project, including the cost of the said first unit dam and power plant has been fully paid into the treasury of the United States." Section 14 of this contract grants an option to the state within a stated time to purchase the perpetual right to the entire power output of the first unit dam and the power plant by a financing scheme therein described.

From all these considerations and provisions, the questions arises as to whether or not the state is authorized to [fol. 70] cede jurisdiction, or the United States Government is authorized to accept jurisdiction over the territory involved. The record discloses that within the area occupied in the operation under plaintiffs' contract are both private, state and tribal lands. Section 8103 Remington's Revised Statutes is the general statute authorizing the state to consent to the acquisition by purchase or condemnation by the United States of any lands for the sites of locks, dams, piers and so forth, and other necessary structures required in the improvement of rivers and harbors of the state and for the sites of forts, magazines, arsenals, docks, navy yards, naval stations and other needful buildings authorized by any Act of Congress, etc., "the consent herein given being in accordance with the 17th clause of the 8th section of the first Article of the Constitution of the United States."

The Section further provides "That the jurisdiction of this state is hereby ceded to the United States over all such land as may have been or may be hereafter required by purchase or condemnation or set aside by the general government for any or either of the purposes hereinbefore mentioned." With a proviso that the state shall retain concurrent jurisdiction for the purpose of executing civil and criminal processes over such territory.

The 17th Clause of the 8th Section of Article I of the Federal Constitution authorizes Congress to exercise exclusive jurisdiction "in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government of the United States, *and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the*

erection of forts, magazines, arsenals, docks, navy yards, and other needful buildings."

[fol. 71] It will be noticed that the consent of the State to the acquisition of lands as mentioned in section 1808 is far more liberal in purpose than the purposes stated in the provisions of the Constitution. The Government is not authorized to exercise exclusive jurisdiction over territory other than that provided for in the Constitution and the ceding of jurisdiction by the State to other lands would be a relinquishment of State jurisdiction over territory over which the government could not acquire jurisdiction. There would thus be a territory over which Congress would have no power or jurisdiction and over which the state had relinquished jurisdiction and applying the rule Ejusdem Generia, it is certain that the purposes for which the Grand Coulee Dam area was acquired is not one of those named by the Constitutional provision.

The history of Grand Coulee Dam Project as disclosed by the records of the Columbia Basin Commission, the various resolutions of the Federal Boards hereto referred to, the contract between the Government and the State through its Commission, justifies the conclusion that the enterprise is entirely different and the purpose far removed from those cases wherein the Government acquired property for erection of forts, arsenals, postoffices, public buildings and the like, all creating structures for strictly Governmental purposes and for permanent use by the government.

This contract borne of the necessities of the economic depression and fostered by the efforts of the Government to bring relief to the unemployed by virtue of and within the spirit of the N. I. R. A. is not intended as a permanently or strictly as a Government project. Its first purpose is to relieve unemployment; its second great purpose is to irrigate vast areas of both the state, private and public lands of the United States which lands shall eventually become the property of the citizens of the state of Washington. All the purposes specifically mentioned in the Constitution are public structures of a character, the use of which would [fol. 72] either be permanent or for an indefinite period of time as distinguished from a mere incidental purpose manifestly of limited duration. The Government expressly retains title only until such time as the State repays it for

the money which is in effect loaned for the purpose of constructing and completing the project.

In Nikas v. Commonwealth, 131 S. E. 236, which was a prosecution for conducting a business without a revenue license imposed by the state, the question of exclusive jurisdiction of the United States was squarely raised. The Supreme Court of Virginia, in disposing of the question, said: "In order to accord immunity from state taxation, the accused must not only show that the land is acquired by the United States, but also that it is for one or more of the purposes so clearly indicated in Article I, Section 8, Clause 17, of the Constitution.

"It is suggested in the brief for the accused that the sole test is whether or not the land has been acquired in the manner referred to in the clause cited; that is, over 'places purchased by the consent of the Legislature of the State in which the same shall be'.

"Clearly, however, this is not the sole test, because it is manifest that the land must also be acquired for one of the specific purposes which are indicated in the clause, namely, for a fort, magizine, arsenal, dock, yard, or other needful building.

"While the land of the United States upon which the station or building is located is exempt from taxation by the state of Virginia because it is the property of the Federal Government, neither the property of others located thereon nor the business of others conducted thereon for their private gain, can be held to be so exempt. As to these others, the state statutes have full force and effect", citing a number of cases in support of these statements.

That it was not the intention of the parties that the Federal Government should have exclusive jurisdiction over [fol. 73] the ceded area is evidenced by a number of the provisions of the specifications of this contract. Section 35 of the specifications referring to the camp site provides, among other things, that: "Regardless of the approval of the contracting officers, the contractor shall comply with all the laws and regulations of the State of Washington or any agency or subdivision thereof which affect the building, maintenance or operation of the contractor's camp."

Section 38 of the specifications regarding sewers and sanitation provides that the collection of garbage and refuse shall be such as approved by the contracting officer or by the proper state or local regulatory authority.

Section 42 requires that the contractor shall make all necessary arrangements with the proper state and county authorities for school facilities. All these provisions have been carried out and provided for by the contractor in accordance with the specifications.

From these considerations, it seems clear to me that the territory in which plaintiffs are operating is not within the exclusive jurisdiction of the Federal Government and, from my examination of the authorities as applied to the facts in this case, I am convinced that the contentions of the plaintiffs, either as to jurisdiction or as to their being a Federal instrumentality exempt from the tax cannot be sustained.

Judgment may be entered in favor of the defendants.

John M. Wilson, Judge.

[File endorsement omitted.]

[fol. 74] IN SUPERIOR COURT OF THURSTON COUNTY

No. 15850

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Co-partners as Atkinson-Kier Company, Plaintiffs,

v.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, Thomas S. Hedtes and T. M. Jenner, Constituting the Tax Commission of the State of Washington, Defendants

JUDGMENT—Filed December 2, 1935

This cause was heretofore submitted upon the issues made by the pleadings herein and evidence having been introduced by the parties and the cause submitted,

It is Now Considered, Ordered and Adjudged that the plaintiffs have not made out a case entitling them to any relief against the defendants, and that this suit be and it is hereby dismissed. Defendants will recover their costs.

Dated this 2d day of December, 1935.

John M. Wilson, Judge.

[File endorsement omitted.]

[fol. 75] IN SUPREME COURT OF WASHINGTON

En Banc. No. 26059

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, Co-partners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company, Appellants,

vs.

THE STATE TAX COMMISSION et al., Respondents

OPINION—Filed October 28, 1936

The question in this case is the power of the state of Washington to exact its occupation tax from the appellants in respect of the compensation received by them from the federal government for the construction of the Grand Coulee dam and power plant. The case is here on appeal from a judgment of the superior court denying injunctive relief against threatened proceedings by the respondents, members of the state tax commission, to enforce collection of the tax.

By contract, made September 17, 1934, with the United States, acting through the bureau of reclamation, the appellants, other than the Mason-Walsh-Atkinson-Kier Company, for a lump sum of approximately twenty-nine million dollars, engaged to construct the dam and power plant in accordance with plans and specifications therefor embodied in the contract by reference. The contract was awarded to the appellants upon competitive bids and after public notice of a call for tenders. The appellant Mason-Walsh-Atkinson-Kier Company was not a party to the contract but was formed by the contractors to have immediate charge of the [fol. 76] work as their agent and representative in fulfilling the contract.

The appellants, both corporate and individual, are non-residents of the state, and their sole business in the state is the prosecution of the work required by their contract.

As necessarily incidental to the prosecution of the contract, they conduct stores, mess-houses, and other commercial activities at the dam site for the convenience of the great number of employees engaged and their families, as well as all others of the public who have occasion to visit

the works. As to these collateral activities, they are conforming to the state laws and paying such license, sales, and other taxes as are required by the state.

The challenged occupation tax is sought to be assessed against the appellants pursuant to chapter 191, Laws of 1933, p. 869 et seq., as amended by chapter 57, Laws of 1933, Ex. Sess., p. 157, et seq., providing:

"From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *." Laws of 1933, Ex. Sess., p. 157, sec. 1.

It was held in Rainier National Park Co. v. Henneford, 182 Wash. 159, 45 P. (2d) 617, that while the tax imposed by chapter 191 is an excise and not a property tax, it is in no sense a license tax and is not imposed as a prerequisite to entering into, or for the regulation of, business, but solely for revenue purposes.

The appellants contend that they are engaged in the work required by their contract as an instrumentality of the government of the United States and, as such, are immune from [fol. 77] the occupation tax. The appellants also contend that their operations are conducted in territory exclusively occupied by the federal government under cession of jurisdiction by the state, and that, by reason of this fact, the state laws are inoperative upon them. While reserving this second objection to the tax, the point is not argued in the appellants' briefs. However, the question is urged in a companion case and disposed of adversely to the appellants' contention. Ryan v. State, — Wash. Dec. —.

It is unnecessary to set out in any detail the provisions of the contract and specifications. It is enough to say, insofar as the fact is material, that while, under its terms, the federal government reserves a large measure of supervisory control for the purpose of insuring proper standards of

material and workmanship and a compliance with the policy of the government in respect of the conditions of labor, the appellants are independent contractors.

The principle upon which the immunity of federal instrumentalities and agencies from state taxation rests is stated in Railroad Co. v. Peniston, 85 U. S. (18 Wall.) 5, where, after referring to the rule often declared by that court that the taxing power of the state is one of its attributes of sovereignty, indispensable to its continued existence and not dependent upon the constitution of the United States or derived from that instrument, it is said:

"There are, we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the federal constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the states. While it is true *that* government cannot exercise its power of taxation so as to destroy the state governments, or embarrass their lawful action, it is equally true that the states may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the national government."

In Metcalf & Eddy v. Mitchell, 269 U. S. 514, it is said [fol. 78] that just what instrumentalities of either a state or the federal government are exempt from taxation by the other, cannot be stated in terms of uniform application. Admittedly, those instrumentalities through which either government immediately and directly exercises its sovereign powers are immune from taxation by the other, and the court refers to illustrative instances in which the claim of immunity was upheld because the instrumentalities taxed were all so intimately connected with the necessary functions of government as to fall within the established exemption.

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of

the rule. Thomson v. Pacific Railroad, 9 Wall. 579; Railroad Co. v. Peniston, 18 Wall. 5; Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375; Gromer v. Standard Dredging Co., 224 U. S. 362, 371: Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319; Choctaw, O. & G. R. R. Co. v. Mackay, 256 U. S. 531.

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other. McCulloch v. Maryland (4 Wheat. 316), supra; Collector v. Day (11 Wall. 113), supra; Dobbins v. Commissioners of Erie County (16 Pet. 435), supra.

* * *

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its power. Hence the limitation upon the taxing powers of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (South Carolina v. United States, 199 U. S. 437, 461; Flint v. Stone Tracy Co., supra (220 U. S. 107), at 172), or the appropriate exercise of the functions of the government affected by it. Railroad Co. v. Peniston, supra, 31." Met-
[fol. 79] calf & Eddy v. Mitchell, supra."

In that case, consulting engineers had been employed to advise states or their subdivisions with reference to proposed water supply and sewage disposal systems. They claimed exemption from the Federal income tax upon the portion of their net income earned through this public employment. Adverting to the principle that any taxation

by one government of the salary of an officer or the public securities or any agency created and controlled by the other, is prohibited, the court continues:

"But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."

In Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, where it was held that a state might tax the interest of a corporation in a dry dock which the United States had the right to use under a contract with the corporation, the court said:

"It seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

In Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, a state tax on premiums collected by bonding insurance companies on surety bonds required of United States officials was held valid. It is said: "But mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control."

General Construction Co. v. Fisher, 149 Ore. 84, 39 P. (2d) 358, 97 A. L. R. 1252, decided in December, 1934, is a case similar in its features to the present one. There, as [fol. 80] here, a foreign corporation, qualified to do business in the state of Oregon, entered into a contract with the Federal government to furnish labor and material for the construction of the Owyhee dam and irrigation works in

connection with the Owyhee irrigation project in Eastern Oregon. The work was done through the department of the interior, and the only net income received by the contractor from its operations in Oregon for the period involved was derived from the contracts with the United States government. The Oregon state tax commission exacted, from the plaintiff, large sums levied upon its income from its operations during several years. The taxes were paid under protest and to prevent levy being made on certain machinery and equipment necessarily used by the contractor in performing its contract with the United States government. Suit was brought to recover the amount of taxes so paid, the complaint alleging, as one of the grounds of attack upon the tax, that it was an unwarranted burden upon the functions of the Federal government. The trial court sustained a demurrer to the complaint, and a judgment was entered dismissing the action. On appeal to the supreme court of Oregon, the judgment of the trial court was affirmed.

The court held that when the construction company, as an independent contractor, entered into a contract to perform labor for, and furnish material to, the Federal government, it did not thereby become a part, or an instrumentality, of the United States, and its property, and its rights to conduct business within the state were not immune from taxation by the state wherein it was located in performing its contract, citing Thompson v. Union Pacific Ry. Co., 76 U. S. (9 Wall.) 579, 19 L. Ed. 792; Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 25 S. Ct. 50; Metcalf & Eddy v. Mitchell, 259 U. S. 514, 46 S. Ct. 172; Gromer v. Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499. Continuing:

[fol. 81] "• • • the property of plaintiff within the state of Oregon was subject to taxation by the state even though used in performing a contract with the federal government. The property thus being taxable, the privilege of using it for such purposes, based on the net income derived from its use is also taxable, whether called a property tax, a privilege tax, or an income tax. In the final analysis it all amounts to the same thing. It was the property of plaintiff that plaintiff alleges was to be taken for the tax.

"The principle of immunity from state or local taxation of the property and instrumentalities of the United States

is generally based upon the direct ownership, or use and control of the property by the United States. Such immunity does not extend to the property of an independent contractor for gain even should it be used in carrying out a contract with the United States. The same principle obtains regarding taxation by the United States of incomes derived by persons and corporations from the state: Metcalf v. Mitchell, supra."

Commenting on the contention made that the imposition of a tax tended to hamper and delay the Federal government in carrying out its contracts, the court said:

"Every tax levied has some remote tendency to interfere with the contractual relations between parties, but that is no reason why such parties should not contribute their just proportion to the expenses of maintaining the government from which they demand protection for their property and privileges. In the instant case the work performed by plaintiff was undoubtedly let to the lowest responsible bidder. We cannot see how the tax complained of in any way impaired said contract, or hindered the federal government in its governmental functions."

An appeal from the decision in that case to the supreme court of the United States was dismissed (Gen. Const. Co. v. Fisher, 295 U. S. 715, 55 S. Ct. 646) upon the authority of Trinityfarm Const. Co. v. Grosjean, 291 U. S. 466, 54 S. Ct. 469; Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172; Lucas v. Howard, 280 U. S. 526, 50 S. Ct. 87; Lucas v. Reed, 281 U. S. 699, 50 S. Ct. 352; Alward v. Johnson, 282 U. S. 509, 514, 51 S. Ct. 273; Fillcuts v. Bunn, 282 U. S. 216, 224, et seq., 51 S. Ct. 125; and Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, 382, 25 S. Ct. 50.

In Six Cos. v. DeVinney, 2 F. Supp. 693, the plaintiff, contractor on Boulder dam and power plant, sought to enjoin the collection of taxes levied by the state of Nevada upon its personal property and poll taxes alleged to be due from [fol. 82] its employees, claiming to be an instrumentality of the United States and, as such, not subject to the revenue laws of the state. Holding against the plaintiff's contention, Norcross, district judge, said:

"The case of a corporation contractor for the construction of public works is one in which, if it may be said to be

an instrumentality of the government, its relations to the government are nevertheless purely contractural. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. In the case of Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the court held that 'the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war,' and said: 'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account.' ''

In the case before us, while it is a fact that the appellants are, for the time, performing no work within the state other than that covered by their contract with the Federal government, they are in no sense creatures of the government, nor brought in by the government especially for the work. The parties to the contract are general contractors engaged in contracting throughout the United States, and the two corporate contractors have qualified themselves to do business in the state of Washington.

In State v. Wiles, 116 Wash. 387, 199 Pac. 749, Wiles had entered into a written contract with the United States government whereby he agreed to carry the United States mail in the city of Seattle between the various depots, wharves, docks, postoffice, and substations, and for the purposes of the contract, he used motor trucks. He was required to provide vehicles for the carriage of the mail and to keep them properly equipped and repaired. Under the contract, the trucks were to be used only in the business of carrying the United States mail. Refusing to obtain a license authorizing the operation of his trucks, he was convicted of operating trucks upon the highways of King County without a license, as required by the state laws. On his appeal [fol. 83] to this court, the appellant contended that he was an instrumentality selected by the government in the performance of its governmental functions and, as such, was immune from the obligation to obtain any pay for a license; that since he was doing for the government what it might do for itself, to impose a tax upon him would be in effect to impose it upon the government, because any private per-

son carrying mail would necessarily require the government to pay him an additional amount equal to the tax. Commenting on this contention and the authorities urged in support of it, the court said:

"Here there is no effort to tax the business of carrying the mail. The appellant is not a direct instrumentality of the government; he is a personal contractor, doing certain work for the government, at a fixed compensation. In no sense is he the representative or agent of the government nor an integral part of it * * *.

"A person building a state road is nothing but a contractor; he is no part of the state or its agencies, and does not thereby inherit the various immunities of the state. There is nothing in appellant's contract which indicates that the government intended to pass its immunities on to him. Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

Deducing the rule from the authorities cited, we said:

"While it is true, generally speaking, that a state may not by its laws hamper and interfere with the free and orderly performance of governmental functions, by taxation or otherwise, yet that interference must be substantial and direct. Every indirect and immaterial interference with the conduct of government business is not violative of the principles upon which the Federal government is founded and performs its duties. The rule of reason must control in all such questions, otherwise the states will be greatly hampered in the conduct of their affairs, without any correspondent benefit flowing to the national government."

The appellants cited Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218, 48 S. Ct. 451, 56 A. L. R. 583, and Graves v. Texas Co., 56 S. Ct. 818. These cases involve a tax on the sale of gasoline to the United States and are alike in principle. In the latter case, the state of Alabama levied an excise tax of six cents a gallon upon storers of gasoline, accruing at the time of withdrawal from storage. This was challenged by corporations storing and selling to the United States large quantities of gasoline required by it for its governmental uses, and delivered pur-

[fol. 84] suant to written contract. There was some contention that the law was one taxing mere storage and not sale, and, as such, was properly taxable by the state. The court was of the opinion that storing alone was not intended to be taxes, but, assuming that by the acts under consideration, the state meant to tax mere storing, the court held that that purpose could not be given effect in respect of the company's sales and deliveries to the United States, without infringing the constitutional principle which safeguarded the Federal government against state taxes.

"Plainly, the sales and deliveries by the company to the United States necessarily include storing and withdrawal from storage. A tax upon anything so essential to the sale of the gas-line to the United States is as objectionable as would be a tax upon the sale itself. The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing.' Brown v. Maryland, 21 Wheat. 419, 444, 6 L. Ed. 678: As held in the Panhandle case (277 U. S. 218, at page 222), (48 S. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583): 'A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons.' So far as concerns the federal immunity from state taxation, a tax upon storing or withdrawing so involved cannot be distinguished from the tax on sales imposed by the Mississippi statute condemned as unconstitutional."

In our opinion, there is a vital distinction between the Graves and the Panhandle Oil Co. cases and the present case. There, the tax of so many cents per gallon was exacted upon every gallon that left the storage for delivery to the United States. The tax was on the sale to the government and was direct and immediate. Here, the occupation tax is but one of numerous incidental expenses neces-

sarily inhering in the qualification of the contractors to perform the work for the government.

The case of Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466, involved a tax of five cents per gallon levied upon gasoline by the state of Louisiana. A contractor with [fol. 85] the Federal government for the construction of levees in Louisiana, to control the waters of the Mississippi river, challenged the right of that state to exact the gallonage tax on gasoline purchased and used by the contractor in performing its contract with the Federal government. In upholding the tax, the court said:

"The power granted by the commerce clause is undoubtedly broad enough to include construction and maintenance of levees in aid of navigation of the Mississippi river, and to authorize the performance of the work directly by government officers and employees or pursuant to contracts such as those awarded to appellant. The latter method was chosen and the validity of the challenged tax is to be tested on that basis. It is not laid upon the choice of means, the making of the contracts, the contracts themselves, or any transaction to which the federal government is a party or in which it is immediately or directly concerned. Nor is the exaction laid or dependent upon the amounts, gross or net, received by the contractor. The exaction in respect to its relation to the Federal undertaking is wholly unlike those considered in Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292; Indian Oil Co. v. Oklahoma, 240 U. S. 522; and Gillespie v. Oklahoma, 257 U. S. 501. Appellant is an independent contractor. Casement v. Brown, 148 U. S. 615, 622. It is not a government instrumentality. Cf. Metcalf & Eddy v. Mitchell, 269 U. S. 514. Group No. 1 Oil Corp. v. Bass, 283 U. S. 279. Unquestionably, as appellant here concedes, Louisiana is free to tax the machinery, storage tanks, tools, etc., that are used for the performance of the contracts. These things are as closely connected with the work as is the gasoline in respect of which is laid the excise in question. There is no room for any distinction between the plant so employed and the gasoline used to generate power. If the payment of state taxes imposed on the property and operations of appellant affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct. Thomas v. Gay, 169 U. S. 264, 275. Metcalf & Eddy

v. Mitchell, supra, 524 et seq. Wheeler Lumber Co. v. United States, 281 U. S. 572, 579. Appellant's claim of immunity is without foundation."

This case, contrasted with Graves v. Texas Co., and the Panhandle Oil Co. case, illustrates, we think, the distinction in principle involved. In the Graves case, the tax was laid upon the direct sale to the government. In the Trinity farm Construction Co. case, a like tax was paid by the contractor, but the sale was not made directly, or in effect, to the Federal government. It was argued that the tax inhered in the cost of the work performed by the contractor, and, therefore, affected the governmental operations as effectively as if the gasoline had been actually sold to the government. But the court brushed this contention aside by saying that the tax was not laid upon the choice of means, the making of the contracts, the contracts themselves, or any trans- [fol. 86] action to which the Federal government was a party or in which it was immediately or directly concerned.

And so, in the present case, the means chosen by the government for building the dam and power plant was by contract, rather than the doing of the work directly by its own officers or agencies.

In Weston v. City Council of Charleston, II Peters 449, the city of Charleston had levied a tax on "six and seven per cent. stock of the United States." In holding the tax void as an unauthorized imposition upon an instrumentality of the Federal government, Chief Justice Marshall used this language:

"It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

"The distinction is, we think, apparent. When lands are sold, no *connexion* remains between the purchase and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it

may then assume is not questioned. The *connexion* between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold. * * *

"The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

We have here an early recognition of the distinction we are making between the cases of Graves v. Texas Co., supra, and Trinityfarm Construction Co. v. Grosjean, supra. The tax was on the contract to repay money borrowed. After the borrowed money was repaid to the lender, the government was no longer concerned or affected. Here, the government, by its contract, agreed to pay the contractors a lump sum for the rendition of specified services. When the money is earned and paid to the contractor and becomes a part of his gross [fol. 87] earnings, the Federal government is no longer concerned with what he may be required to pay as a tax upon the privilege of doing business in this state, no more so than it was concerned in the amount of the tax paid upon gasoline, by the contractor, in building the Mississippi river levees.

In Railroad Co. v. Peniston, 85 U. S. 5, supra, the Union Pacific Railway, a corporation chartered by Congress, sought, by reason of the source of its incorporation and certain services agreed to be rendered to the government of the United States, to avoid taxes levied upon its property by one of the counties of the state of Nebraska. The court, in upholding the tax, pointed out that, as it was levied on the property of the railroad only, it did not affect its capacity to render whatever governmental services it owed the government. In a dissenting opinion, Justice Bradley, after contending that the rule established in McCulloch v. Maryland, 4 Wheat. 316, and other cases following it, should be applied, makes this significant concession to the prevailing opinion.

"The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the

functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interferred with. In that case the contract is the means employed for carrying into execution the powers of the government, and the contract alone, and not the contractor, is exempt from taxation or other interference by the State government."

Our conclusion is that the trial court correctly held appellants liable for payment of the challenged tax, and its [fol. 88] judgment denying injunctive relief is, accordingly, affirmed.

Geraghty, J.

We concur: Millard, C. J. Main, J. Mitchell, J. Tolman, J. Holcomb, J. Beals, J. Blake, J. Steinert, J.

[fol. 89] [File endorsement omitted]

Copy received January 15th, 1937. E. P. Donnelly, Attorneys for Appellees.

[fol. 90] In Supreme Court of the United States

[Title omitted]

Appellants' Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed January 15, 1937

Petition for Appeal

Considering themselves aggrieved by the final decision of the Supreme Court of the State of Washington in the above entitled cause, the plaintiffs Silas Mason Company, Inc., Walsh Construction Company, Guy F. Atkinson, George H. Atkinson, William E. Kier and Elmer L. Kier, coparners as Atkinson-Kier Company, and Mason-Walsh-Atkinson-Kier Company pray that an appeal therefrom to the Su-

preme Court of the United States be allowed and that an order fixing the amount of bond be made.

[fol. 91] ASSIGNMENT OF ERRORS

Appellants assign the following errors in the record and proceedings in the said case. That the statute of the state of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaint of appellants in this:

1. That the challenged tax is levied directly upon the consideration paid by the United States to the appellants for the performance of a contract by means of which the United States Government is carrying on a governmental enterprise. The Supreme Court of the State of Washington erred in holding such a tax to be a valid exercise of the taxing power of the State, and erred in confirming the judgment of the Superior Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

2. That the contract between the United States Government and appellants upon which the challenged tax is levied is being performed upon land acquired by the United States for the purpose. Exclusive jurisdiction over this land has been ceded by the State of Washington to the United States. The Supreme Court of the State of Washington erred in holding that the State of Washington has power to tax the occupation carried on by appellants in that territory, and erred in affirming the judgment of the Superior Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

PRAYER FOR REVERSAL

For which errors appellants pray that the said judgment [fols. 92-135] of the Supreme Court of the State of Washington, dated October 28, 1936, be reversed and judgment rendered in favor of appellants and for costs.

B. H. Kizer, Arnold L. Graves, Counsel for Appellants. Graves, Kizer & Graves, of Counsel for Appellants.

[fol. 136] [File endorsement omitted]

Copy received January 14th, 1937. E. P. Donnelly, Attorneys for Appellees.

[fol. 137] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 15, 1937

The appellants in the above entitled suit, and each of them, having prayed for the allowance of an appeal of this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington on the 28th day of October, 1936, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is Now Here Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the [fol. 138] above entitled cause, as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record and proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty days from the date of this order.

It is further ordered that security for costs on appeal, together with security for the payment of all the taxes involved in said suit, be fixed in the sum of $5,000.

Dated this 15th day of January, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of Washington.

[fols. 139-141] Citation, in usual form, showing service on E. P. Donnelly, filed January 15, 1937, omitted in printing.

[fols. 142-145] Bond on appeal for $5,000.00, approved and filed January 15, 1937, omitted in printing.

[fol. 146] [File endorsement omitted]

Received Feb. 4, 1937. Attorney General's Office, Olympia.

[fol. 146a] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed February 4, 1937

To the Honorable Benjamin T. Hart, Clerk of the Supreme Court of the State of Washington:

It is Stipulated that you shall prepare and transmit to the Supreme Court of the United States under your hand and the seal of the Supreme Court of the State of Washington in the manner and in the time required by the statutes of the United States, rules of the Supreme Court of the United States and the order allowing the appeal herein, a true copy of the material parts of the record herein, including the following:

1. Amended complaint with all exhibits thereto.
2. Answer to amended complaint.
3. Reply.
4. Memorandum opinion Judge of Superior Court for Thurston County.
5. Judgment of dismissal.
6. Opinion of the Supreme Court of Washington, filed October 28, 1936.

[fol. 147] 7. Petition for allowance of appeal to the Supreme Court of the United States, Assignment of Errors, and Prayer for Reversal.

8. Statement as to Jurisdiction.
9. Notice of filing Statement as to Jurisdiction and proof of service thereof.
10. Order allowing appeal.
11. Citation on appeal.
12. Bond on appeal.
13. Præcipe for record on appeal.
14. That part of the statement of facts, commencing at line 9, page 4, thereof, to and including page 60 thereof.

It is Further Stipulated that you shall transmit to the Clerk of the Supreme Court of the United States all of the original exhibits on file in this cause.

It is Further Stipulated that any additional matters of record may be supplied by either party hereto that are deemed necessary, and that counsel may further stipulate in open court as to any other matters as to which information may be asked by the court.

B. H. Kizer, Arnold L. Graves, Counsel for Appellants. E. P. Donnelly, Counsel for Appellees.

[fol. 148] IN SUPERIOR COURT OF THURSTON COUNTY

Excerpt from Statement of Facts

COLLOQUY

Mr. Weller: There are involved upon this hearing before Your Honor three cases. These cases all involve the right of the state of Washington to levy and collect an occupation tax on business transacted at the Grand Coulee Dam within the area there that has been acquired by the Government.

The issues of law involved are practically all the same, and it will be, in the main, a law argument. There are a few facts different, possibly, in the different cases and, for that reason, it has been agreed by counsel that the record will be kept separate in each case and then I think that the law arguments will be made all together.

Now, the first case arose out of the following transactions—

The Court: That is which one?

Mr. Weller: That is the Ryan case against the State.

The Court: What number?

Mr. Weller: I never have had the number in my file.

The Court: It is number 15668, that seems to be the first number filed.

Mr. Donnelly: Yes, Your Honor, that is right.

Mr. Weller: The next one is 16294.

On November 20th, 1933, the Department of the Interior of the United States Government opened bids at Spokane for certain work involving the excavation of over-burden at the dam site and Mr. Ryan was the successful bidder. Now, has Your Honor ever visited this project?

The Court: Not since they started the project, but I have been through that section of the country.

Mr. Weller: Well, just a few words of explanation:

As you travel along the Columbia River, it comes in at the northeast corner of the state, then runs southwest for a ways, then almost directly west, and turns north for a short [fol. 149] distance, and this dam site is about half a mile north of the bend in the river. The river is running almost directly north at the dam.

This first contract which was let, the first bit of business by the United States Government toward the actual construction work on the dam, consisted of removing the dirt at either end. That is, on the east and the west side of the river, for the construction work. It involved the removal of about one million yards on each side of the river and, as I say, this contract was let to Mr. Ryan. And the construction work, the actual excavation work, started a few days before the first of the year. The contract was actually signed and approved by the Government about December 30th. The work started a few days before that.

Now, I think possibly, in order that Your Honor may understand, it might be well to briefly state these steps in their order. I am not attempting, Mr. Graves, to interfere or go into your case, but just stating the fact.

In the next, the following summer, about July, as I recall, the bids were opened for the construction of the first part of the dam, that is the lower part of the dam and Mr. Graves' client, the Mason-Walsh-Atkinson and Kier Company were the successful bidders and their case arises out of the occupation tax involved in that project.

Shortly after that, about in August, the Government—1903—the Government let the contract for the construction of a railroad, a construction railroad is what it is termed in the contract, running from the Northern Pacific stub line generally known as the Central Washington line at Odair to the dam site. This railroad, the contract was let to Mr. Ryan, and this railroad was for the purpose of serving the construction of the dam and undoubtedly any necessary purpose after the dam is constructed, but is called a construction railroad. So there are the three contracts out of which the taxes are sought to be imposed by the Tax Commission of the State of Washington.

[fol. 150] In the first case, the excavation case, Mr. Ryan paid the first assessment that was levied upon him, petitioned the Tax Commission for a refund of the amount and,

upon their denial of the petition, brought suit to recover back.

The other two cases are injunction suits to prevent the Tax Commission from levying or attempting to collect the tax.

Now, I think that, apparently, is a sufficient statement of the surrounding circumstances so the Court will understand what we are getting at. There are probably no disputed facts in this case. We have talked this matter over with Mr. Donnelly several times and, while we have not stipulated in writing as yet, I believe that we will be able to stipulate every necessary fact. And I will say to the Court, on behalf of our client, that if there should be any question regarding any fact that is not brought out that Your Honor believes to be necessary for your decision in this case and we can supply such facts, we will gladly do so.

As far as we are concerned, our cards are on the table. We have nothing to conceal in any way, and I am satisfied that the office of the Attorney General is likewise in that same frame of mind. Now, shall we proceed with the Ryan case?

Mr. Graves: So far as I am concerned, yes, Mr. Weller. It might be desirable to say that these cases are not consolidated, but simply tried together for convenience and the record in each case will be kept separately.

The Court: That is my understanding.

Stipulations as to Facts

Mr. Weller: Now, in the case of Ryan versus the State of Washington, number 15667, I will make the following statement of stipulation as to facts and if there should be any controversy on any of those matters, why, Mr. Donnelly can interrupt at any time.

It is stipulated in open court between the attorneys for plaintiffs and attorneys for the State of Washington that the facts in this case are as follows:

[fol. 151] That Mr. Ryan, the plaintiff, is and was at all times during the time he was engaged on this contract, a citizen of the state of California and his domicile was there, his legal residence. He was actually in the state of Washington during the performance of the contract, but his legal residence was in California at all those times.

Mr. Donnelly: In an instance like that there might be an additional fact that I would like to put in. Should we do it now as we go along? For instance, in regard to the fact that he maintained his office at Spokane, or shall I state that later?

Mr. Weller: In view of the fact that the law did not go into effect until January 1st and he was actually down there before that time, I don't think that would be material in this case. He was on the ground at all times while this law was in effect.

Mr. Donnelly: It might be material in view of the position we take in the first case.

The Court: Well, I suggest, Mr. Donnelly, that you permit counsel to state his facts covered in the stipulation, and if you have any additional facts or you desire to change it in any way, you can take it up afterwards. You can make a note of it as you go along and it will save confusion.

Mr. Weller: I will state, Your Honor, for the purposes of the record, what I do not consider a necessary fact, that prior to the commencement of actual work under this contract, Mr. Ryan had his office in the Davenport Hotel at Spokane, Washington; that he, while there, entered into certain sub-contracts with sub-contractors who actually did the work; that he removed his office to the dam site where it was upon land acquired by the Government and that is and will be actually used by the Government in this project, where his office remained during the entire construction work, or excavation work by him, he having moved his office down there about the middle of December, 1933.

[fol. 152] That the contract with the Department of the Interior was actually entered into by Mr. Ryan about December 30th, 1933. That the title to all of the land upon which all of the work was performed by the plaintiff under said contract had been acquired by the United States Government by purchase prior to the commencement of said work by plaintiff or was being acquired by the United States Government by condemnation thereof in the District Court of the United States for the Eastern District of Washington at Spokane, Washington, for a site for the dam across the Columbia River, together with keepers' dwellings, power houses, and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy, and irrigation.

That all of the land on said project upon which the work of the plaintiff was done and performed was above high water mark of the Columbia River and was necessary for and will actually be used by the United States Government in the construction of said project; and that the work performed by plaintiff under said contract with the United States Government was a necessary part of the construction of said project. That during the period of performance of said contract and the receipt of income therefrom by plaintiff, his sole and principle place of business in the state of Washington was located entirely upon and within the confines of the land so acquired and held by the United States, with the exception that he had his office in Spokane until about the middle of December, 1933.

That plaintiff sold merchandise, consisting generally of gasoline, oil, greases, tires, automobile parts and accessories, the income therefrom being included in and part of the assessment referred to in the notice of appeal and that all of said merchandise was stored, sold, and payment received by plaintiff entirely upon and within the confines of the land so acquired and held by the United States, such sales being made by plaintiff in connection with, but not as a part [fol. 153] of, his contract with the United States.

That the sole business, occupation and source of income of the plaintiff within the state of Washington since January 1st, 1934, until the completion of said contract, has been from and in connection with the performance of this contract with the United States Government, and the sale of merchandise herein used and referred to.

That plaintiff sub-let to others the performance of all the work provided to be done under said contract, on June 4th, 1934, the Tax Commission of the state of Washington issued its order number 1001 assessing plaintiff in the sum of $4,012.25 as the amount alleged to be due from him to the state of Washington on account of the occupation tax and penalty and that on June 11th, 1934, plaintiff paid said amount to the state of Washington; That within twenty days after date of the notice of said assessment, plaintiff filed a petition in writing with the Tax Commission of the state of Washington for hearing upon the order of assessment asking for a refund of the amount paid by him; and that after the hearing, towit, on August 9th, 1934, the Tax Commission entered its order denying plaintiff's petition for a refund; and thereupon this appeal was taken from

that order in accordance with the statute. Now, Mr. Donnelly, do you have some suggestions or changes that you wish to make?

Mr. Donnelly: Yes, Your Honor, in that connection some of the facts which I will want to stipulate, most of them indeed, will go to all three cases, and Mr. Graves has had prepared a map which will dispose of a lot of stipulated facts.

Now, how do you suggest that it will be possible to have the facts stipulated in another case considered in this case?

Mr. Graves: Well, you can just mention at the time the [fol. 154] evidence is to be introduced that it is to be used in this case; and if we want to, later on, refer to it, we will adopt that by reference. The reporter can just incorporate the particular piece of evidence in both cases in the record in each of the case-. For instance, if you want to use this map now, in this case, why you can use it in this case and we will agree, when it comes to the trial of our case, that it is also to be considered in our case.

The Court: I think that will be very satisfactory.

Mr. Graves: That is just to keep the record straight.

Mr. Donnelly: The defendant State of Washington assumes that the contract and specifications will be introduced in evidence and there will be no objection to that.

Mr. Weller: They will be. The stipulation as read, then, is agreeable to the State, is it, Mr. Donnelly?

Mr. Donnelly: With one exception that I will no- mention. The stipulation doesn't refer to the identical contract and the stipulation number 3, or paragraph 3, counsel stipulared that the work was done upon property acquired or being acquired by the United States by condemnation in the District Court of the United States for the Eastern District of Washington at Spokane, where the site of the dam crosses the Columbia River, togeher with keepers' dwellings, power houses and other structures and buildings of all kinds necessary for flood control, improvement of navigation, development of electrical energy and irrigation.

Now, Mr. Weller, there seems to be some conclusions in there, and I understand you have a certified copy of an actual petition which will be introduced in evidence.

Mr. Weller: Yes.

Mr. Donnelly: May we not stipulate, rather than have this conclusion, that the condemnation proceedings them-

selves may be agreed to be typical of all condemnation proceedings over there?

Mr. Weller: We will so stipulate.

[fol. 155] Mr. Donnelly: An argument may turn on some of these keepers' dwellings, railroads and so forth, and we will stipulate to the fact and they will be introduced in evidence as to the condemnation.

Then, with reference to the residence. The contract was performed by Mr. Ryan through sub-letting, sub-letting in two parts, one to M. S. Ross and one to Goodfellow Brothers. Both of those contracts were made at the office of Mr. Ryan in the Davenport Hotel in Spokane.

Mr. Weller: Yes.

Mr. Donnelly: And prior to his going to the dam area for the performance.

Mr. Weller: Those two contracts were both executed prior to the 15th of December, 1933, and while Mr. Ryan still maintained his office at the Davenport Hotel in Spokane.

Mr. Donnelly: That after the starting of the work by the said contractors, Mr. Ryan maintained a staff to supervise that work.

Mr. Weller: That is correct.

Mr. Donnelly: At the area; that in accordance with the provisions of the contract he reported the payroll to the Department of Labor and Industries of his employees.

Mr. Weller: That is correct.

Mr. Donnelly: And that he also reported his payroll in connection with his business of selling gasoline and incidentals, personal property.

Mr. Weller: That is true.

Mr. Donnelly: That the tax, the amount of the tax you mentioned, covers the occupational tax on both phases, that is, the performance of the contract and——

Mr. Weller: I had that in my stipulation.

Mr. Donnelly: And on the business of selling.

Mr. Weller: Yes.

Mr. Donnelly: I think then, that the defendant will stipu-[fol. 156] late to the stipulation as read by counsel with the corrections that I have made, or additions.

Now, in addition to that, if the court please, the defendant wishes to show or wishes to have stipulated with the consent of counsel that the actual performance of the work by the sub-contractors was upon property that had been

acquired, I think, actually by a condemnation, or was it by purchase?

Mr. Weller: By both.

Mr. Donnelly: By purchase and condemnation from private parties. That the work was above the high water mark of the Columbia River. That is, now, with sole reference to Ryan's first contract, being the removal of the overburden on both sides of the river.

Mr. Weller: Yes.

Mr. Donnelly: And that the facts stipulated in the MWAK case, they may be stipulated in your case.

Mr. Weller: I think probably that would be the better way.

Mr. Donnelly: I may say to the Court that later in the stipulation the nature of the contract and the actual conditions will appear and such portions as we wish to be considered in the one case will be referred to. That will be with reference to the first contract.

Mr. Weller: Yes.

Mr. Donnelly: With the exception of such facts as we will stipulate later.

Mr. Weller: It probably will appear, if the Court please, that there may be additional facts as the case develops, that it will be necessary to stipulate into the record, but I think there will be no dispute among counsel as to the facts. I have a little documentary evidence that I desire to introduce. First, plaintiff's identification A in cause 15668. Plaintiff's exhibit A is a copy of the contract and specifications and bond between Mr. Ryan and the Government in this case.

[fol. 157] Mr. Donnelly: I have no objection to that.

The Court: It may be admitted.

(Copy of contract and specifications and bond between plaintiff Ryan and the Government marked plaintiff's A in cause 15668.)

Mr. Weller: Plaintiff's exhibit B is a certified copy from the Federal Court at Spokane, Washington, of a complaint and a declaration of taking and an order of taking in one of the condemnation suits of the land involved in this controversy. It is an order of possession instead of an order of taking.

Mr. Donnelly: We will stipulate that is typical of the procedure brought by the Government.

Mr. Weller: I will say to the Court there were a number of such condemnation suits and that the form of all the papers as certified there were the same in all cases. The same general form was follows.

The Court: It may be admitted.

(Certified copy from Federal Court in Spokane of the complaint and order of possession admitted and marked plaintiff's Exhibit B in cause 15668.)

Mr. Graves: Mr. Reporter, please make a note there that the plaintiff in cause 15850, Silas Mason Company versus Tax Commission will desire to have that exhibit incorporated in the record in their case. That was the last only *only*, the condemnation proceedings. I don't care anything about the contract with Ryan.

Mr. Donnelly: It may be stipulated that that is typical of the condemnation proceedings through the whole project.

Mr. Graves: Yes.

Mr. Weller: I think probably I should offer to read into the record the act of Congress relating to rivers and harbors. It might not be accessible to the Court.

Mr. Graves: Well, just pass it up to the Court for his use. That will be all that is necessary.

[fol. 158] Mr. Weller: This is a copy of the Act relating to the approval of the dam site.

The Court: I presume it is for the Court's convenience in connection with your brief?

Mr. Weller: Yes, Your Honor. Now, I think that is our case in chief, Mr. Donnelly, and we rest.

Mr. Donnelly: With the exception of such facts as we may wish to incorporate in this case in subsequent stipulations, the State will rest.

Mr. Weller: Do you want to take you- case up now, Mr. Graves?

Mr. Graves: Well, let us get the evidence in and then argue it all together.

Mr. Weller: Well, I mean the evidence.

Mr. Graves: I will have some evidence on our part of the case.

Mr. Weller: Probably I had better go ahead with the railroad case.

[fol. 159] Mr. Weller: This evidence now will be introduced in the case of Ryan versus the Tax Commission num-

ber 16294. This is the copy of the contract and specifications and bond in the railroad construction case.

Mr. Donnelly: We will have no objection.

The Court: It may be admitted as plaintiff's Exhibit A in this, cause number 16294.

(Copy of contract, specifications and bond admitted and marked plaintiff's exhibit A in cause No. 16294.)

Mr. Weller: We shall also ask to have admitted in this case the certified copy of the condemnation proceedings because, if the Court please, this case necessarily depends upon the other. In other words, if we fail in the other case, naturally this would fall also.

The Court: It may be understood, then, that plaintiff's exhibit B in the former case is an exhibit in this case.

Mr. Weller: Yes, Your Honor.

(Certified copy of condemnation proceedings admitted in evidence and to be marked plaintiffs exhibit B in cause No. 16294.)

Mr. Weller: I think that is all, Your Honor.

Mr. Donnelly: Now, have you checked the Complaint in the railroad case. I don't know, as a matter of fact; I presume they contain the same allegations of authority that they did in the first one.

Mr. Weller: Yes. We haven't stipulated in this railroad case yet, have we?

Mr. Donnelly: Well, I suggest that any extra stipulation you make now—— (interrupted.)

Mr. Weller: Well, it will be stipulated between counsel for plaintiff and for the defendants in this case, number 16294, the same stipulation that was contained in cause [fol. 160] number 15668; and in addition thereto the following:

That about September 1st, 1934, plaintiff entered into a contract with the United States Government, Department of the Interior, for the construction of a railroad connecting with the Northern Pacific Railway Company tracks at Odair, Washington, running thence to the site of the Grand Coulee Dam;

That the sole and necessary purpose for the construction of said railroad by the United States Government is and was for the assistance and use furnished thereby and in the construction of said dam and other works appurtenant and

necessary thereto and for the beneficial use thereof after said dam and appurtenant works are completed; That the title to all of the lands upon which said railroad construction work was performed by plaintiff under said contract had been acquired for said purpose by purchase and/or condemnation by the United States Government and that the entire performance of said contract by plaintiff was had upon said lands so acquired;

That the plaintiff had his office upon lands other than those belonging to the United States Government acquired for the purpose of this railroad at the beginning of the construction of the railroad and later, possibly when the contract was about half done, he moved his office and living quarters, which were together, to the dam site where they were upon lands acquired by the Government for the purposes of the dam and the railroad.

That the defendants, the Tax Commission of the State of Washington, have made demand upon plaintiff that he furnish reports of the amounts received by him from the United States in payment of the performance of said contract under the occupation tax laws and have threatened to begin action to recover the tax.

Now, is there anything further, Mr. Donnelly?

Mr. Donnelly: It will be stipulated also in that case that Mr. Ryan, in the performance of the contract, made the [fol. 161] reports to the Department of Labor and Industries?

Mr. Weller: Yes, he did. I might state that he performed this contract himself and made his regular reports to the State of Washington, to the Department of Labor and Industries, and paid the premiums therefor.

Mr. Donnelly: And that the sub-contractors, such as they were, did the same thing.

Mr. Weller: Well, I think there were no sub-contracts in this case at all.

Mr. Donnelly: The conclusion that the entire performance of the contract by the plaintiff was had upon such lands so acquired, it will be stipulated to, and that the actual performance of the actual manual labor was done upon the right of way of a certain width that was either purchased or condemned by the Federal Government.

Mr. Weller: That is true.

Mr. Donnelly: The State maintains, however, that it would have been impossible to perform the contract entirely there

and this will be shown by certain terms of it. In that connection it will claim that the office and supervision, the necessary supervision from the office, will be a part of the performance.

Mr. Weller: At the time the contract was actually let, Mr. Ryan's office was at the dam site and when that work was finished, and before he commenced the railroad construction, he removed his office to Coulee City where it was maintained for about half the performance of the railroad contract and then moved back to the dam site upon Government land.

Mr. Donnelly: It will be stipulated that the railroad was completed for the dam purposes as now being operated by the MWAK Company in that connection?

Mr. Weller: Well, that is part of Mr. Graves' case rather than ours.

[fol. 162] Mr. Donnelly: And that the right of way for the railroad is approximately thirty miles in length and is not shown upon the map which will be introduced in evidence in the MWAK Company case.

Mr. Weller: That is correct.

Mr. Donnelly: It is stipulated the Government did furnish it in accordance with the terms of the contract and, with one exception, the title has been acquired.

Mr. Weller: And that is being condemned.

Mr. Donnelly: The right of possession has been granted.

Mr. Weller: Yes, that is correct.

Mr. Donnelly: The allegation, Mr. Weller, that will be stipulated to that suit is about to be commenced, that is, it is understood to the extent if we make a demand in the course of this action, the ordinary process of the court will be invoked against him; that is what you mean, is it?

Mr. Weller: Yes, and this action is brought for an injunction to prevent that.

Mr. Donnelly: Yes. In the first Ryan case, Mr. Weller, for what it is worth, will you stipulate that Mr. Ryan has sub-let the contract to Mrs. Paine or entered into some negotiations for that and that a lawsuit in the Superior Court of Spokane County was brought by Mrs. Paine for the damages which were recovered in that Court?

Mr. Weller: That is true. I don't think it is material.

Mr. Donnelly: And that this was done from the office in the Davenport Hotel.

Mr. Weller: Yes, that is correct. I don't think it is material at all, Mr. Donnelly.

Mr. Donnelly: Our position is that he was doing his work by sub-letting.

Mr. Weller: Yes, that is true.

[fol. 163] Mr. Donnelly: Then, in the railroad case, we will call it, the State will rest with the addition of such facts as will be disclosed by the later stipulation.

Mr. Graves: May it please Your Honor, the suit of the Silas Mason Company et al. against the Tax Commission, number 15850, is a suit in equity for an injunction based upon constitutional grounds to prevent the Tax Commission from taking any steps toward the laying of a tax under the occupational tax law of 1933.

The Silas Mason Company is a corporation organized under the laws of the state of Delaware. The plaintiff, Walsh Construction Company is a corporation organized under the laws of the state of Iowa, and the co-partnership of Guy F. Atkinson and George H. Atkinson and William E. Kier, are doing business as partners under the name of Atkinson-Kier Company and they are all non-residents of the state of Washington.

The plaintiffs Mason, Walsh, Atkinson, Kier Company is a corporation organized under the laws of the state of Delaware and is the agent through which the other parties are doing the work which is involved in this action.

May I ask if Your Honor has read the pleadings in this case?

The Court: No, I have not.

Mr. Graves: I will go a little bit more in detail, then. When the Bonneville Dam project was afoot, the Silas Mason Company and the co-partnership of Atkinson-Kier Company bid on the work for the construction of that dam. They were unsucessful in their bid, and they then determined, in connection with another party which was afterwards known to be the Walsh Construction Company, to look into the construction of the Grand Coulee Dam and perhaps make bids thereon. They did make the investigation and did submit bids for that work. The three who bid were the Silas Mason Company, the Walsh Construction [fol. 164] Company and the Atkinson-Kier Company. They were the successful bidders for the construction of the Grand Coulee Dam, being awarded the main part of the construction at twenty-nine million and some hundrers of thousands of dollars.

After their bid was accepted they were required to give a

five million dollar bond and that took some months to be arranged for. During that time the Guy F. Atkinson Company, a co-partnership not bidders on this work, but related to the Atkinson-Kier Company, sunk some test pits there to see what the prospects were for successful carrying out of the contract. The bond was secured and filed in September and they thereupon became the successful- or the contractors for the construction of the dam.

They thereupon organized the Mason-Walsh-Atkinson-Kier Company, a corporation under the laws of the state of Delaware, which was brought into being by the three contractors, the Silas Mason Company, the Walsh Construction Company and the Atkinson-Kier Company, for no other purpose than to construct the dam as the agent for the contractors.

The United States statute forbids assigning such contracts as these and, as it was necessary for the successful performance of the work, to keep this particular work segregated from their other work in which they were engaged, they had to have this intermediary to do the work. That company opened offices in the state of Washington in the city of Spokane and from those offices it arranged for purchases, received bids for work, for machinery and supplies and so forth, that would be needed on the construction work when begun.

From those offices, also, they dictated the doing of such preliminary work as was necessary at the dam, the construction of administration buildings, the construction of houses in which people employed upon the work could live, and so forth.

[fol. 165] As soon as those buildings were completed at the dam site, which is now what I will refer to as the Government Reservation, they moved their offices there and then worked again under their contract. Everything that was done in Spokane was merely preliminary to it, making such arrangements as would be necessary to be made in preparation for such a work.

Since that time the work has progressed, as we will attempt to show, wholly upon this Government Reservation, a map of which will be put in evidence. There was one exception or so that will be claimed by my brother for the State, and that was that the Government constructed a railroad from the town of Odair on the Northern Pacific Railroad to the dam site.

Under the contract with the Government, the plaintiffs were required to operate that road. They didn't own it, didn't construct it; it was constructed and owned by the Government. But they were required, as I say, to operate the road at their own expense. That railroad is used solely for the hauling of Government supplies and supplies for the plaintiff in this action. It is solely to furnish a means of getting the material that is needed for the construction of the dam upon the dam site that that road was constructed and is used. I think, perhaps, that is sufficient outline of the facts.

On the law of the case, I will say that our points are these: First, the tax which is imposed by the 1933 Act is an excise, a privilege tax upon the business, upon the right to do business, upon business activities within the state of Washington.

The plaintiffs are engaged in no other business, at least, there is nothing else that is affected by this action, than the construction of the Grand Coulee Dam and they are doing that under and by virtue of a contract with the United States.

The tax which the State is seeking to lay is computed upon the gross income received by plaintiffs for the per- [fol. 166] formance of the contract, of their contract with the United States. Under repeated decisions of the Supreme Court of the United States, the tax upon the income derived from a contract with the United States is a tax upon the contract itself and, as such, it cannot be recovered. I imagine it will be conceded that the State could not lay a tax upon the contract itself, so that the burden on this first point lies upon us only to establish that the tax measured by gross income is a tax upon the contract itself.

I may state that point in another way. In questions of taxation arising under a contract with the United States, the question is whether the tax is a direct or an indirect burden upon the contract. It is just the same as it is where the question of interstate commerce is involved. Where that is a question, if the tax is a direct burden upon interstate commerce, it is, of course, invalid; while, on the other hand, if it is only an indirect burden, it may be sustained.

So here, the tax being upon gross income derived from this contract is necessarily a direct burden upon the contract; a tax which was measured by net income might be, but would not necessarily be a direct burden. It would

be presumably an indirect burden. And if we were to seek to establish it as a direct burden, we would have to show something more than the fact that a tax was laid upon the net income. But the Supreme Court of the United States has said that is a well settled rule that the distinction between what is a direct and an indirect burden may be determined by whether the tax is upon the gross income or upon the net. And has said that always where the tax is upon the gross income, it is a direct burden, while, if it is upon the net, is, presumably at least, an indirect burden. That is our first point.

And our second point is the same that has been suggested by my brother Weller here, that this work is carried on upon a reservation owned by the United States, over which the [fol. 167] State has ceded jurisdiction. I will have a little evidence to introduce but not very much.

The Court: You may proceed.

Mr. Groves: I offer in evidence the contract between the United States and the Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company, which has been referred to.

The Court: It may be admitted.

(Contract between United States and Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company admitted and marked plaintiff's exhibit A.)

Mr. Graves: I offer next the specifications under which this work was done, not in their entirety, however, but pages 15 to 89 of the specifications. Those are the printed conditions. The other matters are maps and drawings and engineer's details which would be of no information to the court. Mr. Donnelly thinks there might be some point in having it all in, so I will put them in as a whole, the specifications.

The Court: They may be admitted.

(Specifications above referred to admitted in evidence and marked plaintiff's exhibit B.)

Mr. Graves: I offer, as one exhibit, a letter from F. A. Banks, construction engineer for the United States Department of the Interior, Bureau of Reclamation, at the dam, addressed to ourselves, attorneys for the plaintiff, stating what the lands are that are used by the Government at the Grand Coulee Dam, how the title was acquired and

the uses to which they are put; and with that a map to which the letter refers, which shows the lands acquired by the United States and, by tracings, shows where the works are located and the use to which the various parts are put. I offer the map as explained by the letter and by the tracings which appear thereon and the explanations which go with it.

[fol. 168] The Court: You offer the two as one exhibit?

Mr. Graves: Yes, Your Honor. There are three pages of the letter and the one map attached to it.

Mr. Donnelly: I think there will be some explanation supplemental to that.

The Court: It may be admitted.

(Letter and map above referred to admitted in evidence and marked plaintiff's exhibit C.)

Mr. Graves: I offer in evidence the first report of the Columbia Basin Commission of the State of Washington dated at Spokane, Washington, on December 19th, 1933. This is the first report of the Columbia Basin Commission.

The Court: It may be admitted.

(First report of Columbia Basin Commission of State of Washington, dated at Spokane, Wash., December 19, 1933, admitted in evidence and marked plaintiff's exhibit D.)

Mr. Graves: I offer next the second report of the Columbia Basin Commission dated at Spokane, Washington, January 22nd, 1935.

The Court: It may be admitted.

(Second report of Columbia Basin Commission of the State of Washington dated at Spokane, Washington, January 22, 1935, admitted and marked plaintiff's exhibit E.)

Mr. Graves: And Your Honor already has a copy of the Rivers and Harbors Bill containing the authorization for the construction of this dam.

The Court: Yes.

Guy F. Atkinson, being a witness called on behalf of the plaintiff Silas Mason Company, having first been duly sworn, testified as follows:

[fol. 169] Direct examination.

By Mr. Graves:

Q. Your name is Guy F. Atkinson?

A. Yes, sir.

Q. What is your business?

A. General contractor.

Q. Are you a member of the partnership of Atkinson-Kier Company, one of the bidders for the construction of the Grand Coulee Dam?

A. I am.

Q. Please tell me the history of your connection with that dam, how you came to be bidders on it, how you came to be associated as you were in the contract.

A. Well, I had known Silas Mason for a number of years and when the main dam at Bonneville came up, I asked him to bid with us on that job. It was too large for us to handle. And we put in a bid on that job, but we were not low bidders. The Cou-ee Dam came up shortly after and he telephoned me from New York and asked if we wanted to bid and I told him we could take part of it, so we went ahead and figured the job and a few days before the bid went in, why, Mr. Walsh came out and the three of us decided to bid together, bid in the three different names, Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company.

Q. Now, of what state are you a resident?

A. California.

Q. And the other members of the partnership of the Atkinson-Kier Company?

A. All from California. Kier was from San Diego and we are from San Francisco.

[fol. 170] Q. What is the general business of this partnership?

A. Well, this partnership was a special partnership organized to bid on some of these larger jobs.

Q. Is it a special partnership?

A. Yes.

Q. For the purposes of this bid?

A. For this bid and other large jobs. The W. E. Kier Construction Company operates out of San Diego and the Guy F. Atkinson Company operates out of San Francisco. When we bid together we bid as Atkinson-Kier Company, a separate partnership.

Q. None of the members of that partnership have ever been residents of the state of Washington?

A. Not until we moved up to do the work.

Q. Just for the purpose of this work?

A. Yes.

Q. Are you engaged in any other business in the state of Washington, the partnership, than the carrying on of this work?

A. No, sir.

Q. Now, with respect to the Silas Mason Company, that is a corporation; what is its business?

A. General contracting.

Q. And where are its operations carried on, if you know?

A. Well, different parts of the country. Their chief office is New York City, 500 Fifth Avenue, New York City.

Q. Is it engaged in any other operations in the state of Washington than in the construction of the Grand Coulee Dam?

A. No, sir.

Mr. Graves: You won't mind if I lead a little bit, Mr. Donnelly?

Mr. Donnelly: No, not at all. Go right ahead.

Mr. Graves:

Q. The Silas Mason Company came to this state solely [fol. 171] for the purpose of bidding on and, after its bid was accepted, of performing this contract that is involved in this suit; is that right?

A. Yes, sir.

Q. Now, about the Walsh Construction Company, where are its headquarters?

A. Davenport, Iowa.

Q. It also is a contracting company?

A. Yes, they do work all over the country.

Q. And has it any other work in the state of Washington than that involved in this case?

A. No, sir.

Q. It came here, did it, for the purpose of engaging in that work?

A. Yes, sir.

Q. Now, you spoke something about bidding on the Bonneville Dam, the partnership of Atkinson-Kier Company and Silas Mason Company.

A. Yes, that is the way the bid was put in on the Bonneville job.

Q. That bid was submitted where?

A. Portland, Oregon.

Q. And was for the construction of a dam across the Columbia River between the states of Oregon and Washington?

A. Yes, that was the main dam between Washington and the island.

Q. The partnership of Guy F. Atkinson Company had a smaller contract, did it not, on that Bonneville Dam?

A. Yes, we had the first contract at Bonneville, which was the excavation for the locks and the power house dam. That was across the slough, over to Bradford Island. That is where our work was located but this large dam bid in by Silas Mason was the dam across the main channel.

Q. The firm of Guy F. Atkinson had no relation to Atkinson-Kier Company except that you and your son, George H. Atkinson, were partners in both firms?

[fol. 172] A. Yes, that is the case.

Q. Approximately, when was your bid for the construction of the Grand Coulee dam accepted?

A. Well, we bid on the job on June 19th. There was a wire sent out from Washington on July 16th accepting our bid. We didn't get it until the 17th. Both dates were 1934. About four weeks after we bid, before our bid was accepted.

Q. What was the first thing that you did after the acceptance of that, Mr. Atkinson?

A. Well, we proceeded to procure a five million dollar bond.

Q. How long did that take you?

A. Well, that proved to be a big job. It took all of the responsible bonding companies in the country to sign that bond and we were in New York between six weeks and two months negotiating for that bond. And it seemed that when we would get one obstacle overcome the attorney for some bonding company would find something else that he wanted cleared up and it was quite a big job to secure the bond. In fact, before the job was let, the bonding company said that the bond couldn't be written because the bonding company's finances had depreciated so much since the hard times that they notified the Government that the bonding

company could not furnish a five million dollar bond and they would not write a bid bond for us. So, when we put in our bid, we put in a two million dollar certified check instead of a bid bond because the bonding companies refused to write a bid bond and frankly told us that they did not think a five million dollar bond could be secured.

After we got the contract, that is what we had to start on with. They thought they couldn't do it and we had to sell it to one company and then another company, there-
[fol. 173] fore it took us two months to secure that bond.

Q. A number of bonding companies signed that bond ultimately, did they not?

A. Twenty-four companies signed and a great many of them took reinsurance on what they signed for.

Q. Those negotiations were all carried on in New York?

A. Yes.

Q. After you procured the bond, what next did you do, Mr. Atkinson? When I speak of you I mean the three contractors, the three successful bidders.

A. Yes. Well, while we were getting this bond, we agreed on our company organization and incorporated the Mason-Walsh-Atkinson-Kier Company in Delaware on September 14th, 1934, and the bond had all been signed up but was not to be delivered to us until our incorporation was complete and an agency agreement was signed, an escrow agreement was signed, but we had all of that worked up, so when we incorporated on the 13th day of September, the next day we held our organization meeting and delivered our agreements to the bonding companies. They delivered our bond and then we were ready to do business. That was on the 14th of September. On the 17th of September—— (interrupted.)

Q. Well, now, may I interrupt you a minute there? The Company you refer to was the Mason-Walsh-Atkinson-Kier Company, one of the plaintiffs in this case?

A. Yes.

Q. And the purpose of its organization was to do the actual work on the dam as an agent for the three contracting firms?

A. Yes. Then our business in New York was all organized on September 14th. Our bond was filed with the Government in Denver on September 17th and our checks were then released, the two million dollars that had been on de-

[fol. 174] posit was returned to us at that time and you might say we had a contract for Grand Coulee Dam, although the contract stated that we should not—that our time would commence when the Government notified us to proceed. Of course, our bond was filed, which the Government was satisfied with, but our contract, I don't think, was actually legal until it went to Washington and was approved, so we received a notice to proceed. I don't know as to the exact date of that, but sometime in October, and then you might say that the contract was fully completed.

Q. What were the first steps that you took?

A. Well, we all gathered at Spokane and there was hundreds of equipment men, material men, waiting there to see us. We talked to them and we opened offices in Spokane. We had to have room.

Q. Spokane is how far from the dam site?

A. One hundred miles.

Q. There was at that time nothing whatever at the dam site except a few scattered buildings?

A. No.

Q. And there was no town of any size nearer to the dam site than Spokane?

A. Well, there is the town of Almira about twenty miles from there.

Q. A small place of a thousand people, or such a matter?

A. Yes. Spokane was the only place we could get in and out to start the work; so we opened this office there and we received these different equipment men and let them explain the merits of their equipment and some conditional orders were placed. But the main thing was to get a line-up as to what we were going to do and we just took these fellows' prices and tabulated them and as soon as we could get our headquarters building out at the camp we moved our offices all out to the dam site. And there is where all the business was done and has been since.

[fol. 175] Q. Now, among other things that you did in Spokane, you arranged for a planing mill and lumber mill there to furnish houses which could be set up, and buildings and so forth?

A. Yes, we arranged for them to build us so many ready-cut houses in sections and we hauled them out. We could put them up much faster and the trouble was at the start that we had no way of housing our men. We were putting

up the camp so it was a great help to us to get these houses that were already constructed in sections, and some of those three-room houses, I think it took about six men to set up one of them in a day and it hurried the work and let us get into camp much quicker.

Q. Now, during the time that this was being done, were office buildings in process of construction out there at the dam site?

A. Yes, that was about the first building we started on, was the general office building.

Q. When did you move your offices out to that place, out to the dam site?

A. Well, I couldn't give you the exact date. I would say the latter part of October, just about.

Q. Just as soon as they were completed?

A. As soon as we could get the building up, and it was just a wood constructed building with wall-board, no plastering or no chimneys. They do all the heating there by electricity. As soon as we could get that building up, we moved right in.

Q. Was any actual construction work done until after you had moved your offices out to the dam site?

A. On the dam?

Q. I mean construction work under this contract. Understand that is what I am referring to always, your contract.

[fol. 176] A. Yes.

Q. There was nothing done, you say?

A. No, we had nothing to work with. We had no place to house our men. The first thing we had to do was to get our offices and cook-house up and I think our cook-house opened about the last day of October or November, I wouldn't be sure as to the date. And when we got moved out there—— (interrupted.)

Mr. Donnelly: The report shows November 2nd. I don't know whether that is exactly accurate.

A. Well, that is probably it.

Mr. Graves: Your Honor will understand with respect to this work that I am referring wholly to the contract which is involved in this particular action, for the construction of the main dam. There was preliminary work done by Mr. Ryan and perhaps other contractors there, pre-

liminary work, but I am referring only to the work done under this particular contract.

The Court: I understand.

Mr. Graves:

Q. You didn't do any work, then, for which you received any *companies* until after you moved down there?

A. No, sir.

Q. Now, Mr. Atkinson, referring to this railroad out to Odair—well, the specifications under which you did this contract provided for the construction of a railroad for use in transporting construction materials to the dam site. That railroad was to be constructed by the Government from the Northern Pacific Railway at Odair, Washington, to the camp site and provided, also, that you should operate that railroad, when constructed, at your own expense. That [fol. 177] railroad was build by the Government?

A. Yes, sir.

Q. And has been operated by you since its construction?

A. Yes, sir.

Q. What is hauled over that railroad?

A. Just our material, lumber, steel work, equipment.

Q. The contract provides that certain portions of these materials shall be furnished by the Government, I believe?

A. Yes, the Government furnishes all cement, all reinforcing steel and some pipe.

Q. Is the material which is furnished by the Government hauled over that railroad, also?

A. Yes, the Government delivered all that material to us at Odair.

Q. And you have to haul it in from there?

A. Haul it in as part of our contract.

Q. Is anything hauled over that line except material designed for construction of the dam, either by you or by the Government?

A. No, sir. We hauled a carload of coal for the church over in Coulee City, but we hauled it free.

Q. You hauled it for what?

A. The church. There is a church at Coulee City and they had a carload of coal they wanted hauled in and we told them we weren't a common carrier, but told them we would bring it in free.

Q. Some such hauling as that, you have done as a matter of public accommodation?

A. That is all. Otherwise, everything we haul is for ourselves or under contract with the Government.

Q. The checks that have been received for the construction work as it progressed, how were they made out?

[fol. 178] A. The checks were made out to Silas Mason Company, Walsh Construction Company and Atkinson-Kier Company; but about the time we started we asked the Government to have them made to the Mason-Walsh-Atkinson-Kier Company, they being the agents and the people that were doing the work. And they had us sign some blanks whereby they recognized the Mason-Walsh-Atkinson-Kier Company as the agents. But the checks still come made out to the original bidders. We have a rubber stamp that says, "Pay to the order of the bank", the three original bidders' names stamped on, and then "By Mason-Walsh-Atkinson-Kier Company, attorney in fact." And the Mason-Walsh-Atkinson-Kier is signed by one of the officers of our corporation.

Q. And those checks are delivered to the Mason-Walsh-Atkinson-Kier Company and used by it?

A. Yes, sir.

Mr. Graves: That is all.

Cross-examination.

By Mr. Donnelly:

Q. Mr. Atkinson, I wonder if you remember—I am refreshing myself as to some dates from the report which is in evidence. That may not be just right. Do you remember when the contract was made with the Washington Water Power Company for the electric light and power for the project?

A. Well, I don't know as to the date.

Q. It says here on October 8th.

A. I would think that was about right.

Q. That was required to furnish the power for all the project at the dam?

A. Yes. That contract had to be signed up because after we made the contract, then we had to build a thirty mile

[fol. 179] transmission line from Coulee City where we connected on to their line into the dam site.

Q. You built that by sub-contract?

A. Yes.

Q. Did you move down there before you got the electric light and power down there?

A. Yes. There was a little electric light plant at Grand Coulee Dam run by three fellows from Seattle. They called them the three engineers. A Diesel electrical plant. And we had lights there, not enough to run our whole camp, but we had lights there and had heat there before our high tension line was brought in.

Q. It says here the high tension line was completed about November 18th, or on November 18th.

A. I think that is about it.

Q. And on October 16th you started work on a temporary trestle and bridge across the Columbia River?

A. Yes.

Q. On October 27th they started to work on the contractor's railroad. Did you have to build the railroad, or does ther refer to Ryan?

A. No, Ryan, I think, had started before that. We had certain sections of railroad to build to connect up; the Government brought the railroad into Grand Coulee Dam site down the hill and if we wanted to take it any further we had to connect up. So we decided to put our railroad bridge down the river about half a mile, so it necessitated about a half mile of track down the river and there was some very heavy rock work and a tunnel; and we went to work and done that among the first things while we were getting into camp.

Q. Now, Mr. Atkinson, the report here shows that as soon as the performance bond was furnished, and they put that at August 13th, that the corps of engineers were in the [fol. 180] field to lay out the camp and men were set to work making test pits.

A. They set that at what?

Q. August 16th.

A. No, the performance bond was not furnished or filed until September 17th. What report is that?

Q. That is the Columbia report. I thought that was different from what you said.

Mr. Graves: That is the Columbia Basin Commission report, is is not?

Mr. Donnelly: Yes.

A. (Continued.) They are in error because the bond wasn't delivered to us in New York until September 14th and we sent it by special messenger by airplane to Denver so it would be there Monday morning, on the 17th.

Mr. Donnelly:

Q. I believe your reports of Guy F. Atkinson Company, you made some reports to the Department of Labor and Industries that actual work had started, as a partnership, I believe.

A. Well, here is what happened. After the Government awarded us the contract on July 16th, the job being so large and not having had time to make the necessary investigations that should have been made on a thirty million dollar job before—of course, we did, we made investigations to satisfy ourselves enough to make a bid—but we didn't know just what course we were going to pursue in doing the work in handling the river Grand Coulee Dam is a very, I would say, treacherous job of taking care of the river. At Boulder Dam they handled it by building tunnels and turning the water through, but at Grand Coulee we had to take care of the river all of the time, part of the time through a channel and then bring it back and put it over the concrete while we were doing the other side. And we were very apprehensive as to what kind of coffer-dam we should build and therefore we wanted to know what the condition [fol. 181] of the ground was where we had to put this coffee-dam. So about the time the Government accepted our bid on July 16th we decided to put a shaft on each side of the river to ascertain what kind of soil or material that was, down to bedrock, which was about a hundred and fifty feet or more below. So I was in New York and we talked it over there, and I advised my son, who was at Bonneville. He and Mr. Kier went up and started that work and that was handled—now, Mr. Donnelly, you were speaking of what the Guy F. Atkinson Company did?

Q. Yes.

A. Yes. Well, there was nobody that had any authority up to that time. Our corporation hadn't been organized and we couldn't speak for Walsh and couldn't speak for

Silas Mason. We could speak for ourselves, and somebody had to act. We couldn't start men to work there unless they were working for somebody that had compensation insurance and we took out the compensation in the name of Guy F. Atkinson Company and we did that particular work of putting down these two shafts which were no part of our contract. They were merely investigations, something we might have done before we bid on the work. We didn't have our contract at the time, so it wasn't part of the contract because our contract was not a legal contract until six weeks after that; and that is the reason that that was handled by Guy F. Atkinson Company there. That was the only one that could apply for employer's liability insurance and we didn't do the work under sub-contract. We just did it, and we were reimbursed by the Mason-Walsh-Atkinson-Kier Company after its organization.

Q. You did some work. Did you do any work prior to September 17th, the time when you had notice to proceed?

A. No, except this exploratory work, was all.

Q. At the dam site?

[fol. 182] A. That was done in July and August and it wasn't part of our contract. It was just merely ascertaining what ground we might anticipate in driving our cofferdam. The MWAK Company made its first report to the Department of Labor and Industries and showed work in September or October, the Guy F. Atkinson Company.

A. Yes.

Q. And paid the premium for it?

A. Well, it might have been we sent some trucks up there. We handled all the trucks there under the name of Guy F. Atkinson Company for a while and billed the other company for it.

Q. You did that in October and September, September and October?

A. Yes, clear up to December, I think, we handled all the trucks.

Q. Yes, even after the MWAK was organized, you continued to handle the trucking?

A. We did not send any trucks up there until after the MWAK Company was organized, but we had a lot of trucks at Bonneville. We sent our trucks up there. MWAK had no trucks. We hired a lot more and the MWAK Company was pretty busy and they suggested that our men handle

the trucks, which we did up to the first of the year, I think, and finally the MWAK took it over.

Mr. Donnelly: I think that is all.

Redirect examination.

By Mr. Graves:

Q. Referring to this exploratory work done by Guy F. Atkinson Company, you have said that was no part of your contract with the Government, referring to the contract of Silas Mason-Walsh Construction-Arkinson-Kier Company. Were you ever paid anything by the Government for the doing of that work?

[fol. 183] A. No, sir. It was just investigation so we could better decide what way to proceed with our coffer-dam. We have the largest coffer-dam in the world, I presume, much larger than has ever been attempted before, and it was a very ticklish job and we wanted all the information on it we could get.

Q. That was done before you had gotten this five million dollar bond?

A. Yes.

Q. And while you were having so much difficulty getting it?

A. Yes.

Q. And I suppose it is within the bounds of possibility, Mr. Atkinson, if those test pits had shown some very bad conditions there that would have rendered the work almost impossible, you probably never would have gotten that five million dollar bond.

A. That is true. I beg your pardon, but what was shown up in that test pit helped the bonding companies at last to make up their minds that it wasn't as risky as they thought it was, because we had data on that before.

Q. Well, that was part of the information that was given them?

A. Yes.

Q. While you were in the process of getting this bond?

A. Yes.

Q. Now, what was the nearest railroad to that dam site, I mean established railroad?

A. Well, Coulee City—well, Almira was a little closer than Coulee City, but there was a private railroad to Coulee

City and that was determined to be the best railroad station to operate from.

Q. How far distanct was that?

A. Coulee City was thirty miles.

Q. And Odair was thirty miles?

A. Yes, practically the same distance.

Q. The bridge across the Columbia that was referred [fol. 184] to, the putting in of the temporary bridge there, is the contractor's camp on the same side of the river as Spokane?

A. No, it is on the other side and it was necessary. Our camp location, where the Government told us we should build our camp, was on the other side of the river from the side you land at when coming from Spokane, so we had no way of getting over there only by ferry boat, so it was necessary that we put in a good trestle bridge there so we could get our material across in a hurry in building our camp.

Q. And your principal source of supply is at Spokane?

A. Yes. That bridge was just in there—well, we put it in in the fall and we had to take it out before high water the next spring. It was just a low trestle.

Q. Just a temporary bridge?

A. Temporary bridge, yes.

Mr. Graves: That is all.

Mr. Donnelly: That is all.

(Witness excused.)

STIPULATIONS AS TO FACTS

Mr. Graves: That is the plaintiff's case, Your Honor.

The Court: Have you any evidence, Mr. Donnelly?

Mr. Donnelly: None except as we will stipulate. Now, Mr. Graves, you understood that the exhibits attached to the complaint are in evidence?

Mr. Graves: Oh, yes. I would have proved some of the matters alleged there, but they are admitted, and I didn't refer to them.

Mr. Donnelly: And it is agreed that the allegations of the Answer, there are certain facts in exhibits D and E, the Columbia Basin reports, that we will want to refer to, and I take it they are now introduced in evidence and the allegations therein are presumed to be correct.

[fol. 185] Mr. Graves: Yes, they can be presumed to be correct. I think probably they have got them correct except maybe something that don't amount to anything.

Mr. Donnelly: I might state to the Court at this point the particular things that will be pointed out in here, although that will be done more fully in argument.

The Court: I think you had better wait until you make your argument.

Mr. Graves: I suppose it will be understood those Commission reports boost the Commission's work?

Mr. Donnelly: Very flattering.

Mr. Graves: They have to give a good account of themselves.

Mr. Donnelly: Now, Mr. Graves, there is a slight change that you know of in the contract. Now, is that material?

Mr. Graves: I don't consider it material. If you wanted to get that properly, you would have to have an engineer testify.

Mr. Donnelly: The fact is that the original dam was let as a power project and the specifications of the MWAK contract were changed recently to lower and widen it, so that it is, in fact, a base for the ultimate higher dam which will be an irrigation project.

Mr. Graves: Yes, the Government reserved the right to make such changes as it desired in the contract, subject to adjustment.

Mr. Donnelly: Yes. The principal thing the State would like to stipulate with reference to the plaintiff MWAK exhibit C, the map and letter, will you correct me if I say anything wrong, Mr. Graves?

Mr. Graves: Yes.

Mr. Donnelly: It will be stipulated that the map introduced in evidence as a part of Exhibit C is correct, and that it correctly shows property acquired by the Federal Government for the work in progress. There is, however, no [fol. 186] established reservation as such, either by the Secretary of the Interior or by Act of Congress and no plat with definite boundaries filed. The map shows the extent of the land acquired now in the vicinity of the dam itself.

In Addition to this there is being acquired flowage lands above the dam on both sides of the river by the Federal Government. It is in the process of being acquired and a large lake for reservoir purposes will be made to the north

and in that process a great many thousand acres of land will be necessary, that is for the ultimate project. That in this ultimate project there will be public land, probably largely privately owned land, some state and county lands, and some school lands. That the irrigation project, if and when completed, will involve a great many acres they refer to in their report to the south, but that is not being acquired at the present time. That there is contemplated to be acquired in the immediate vicinity of the property shown on the map, exhibit C, land for the power plant. That has not yet been acquired.

The tract of land numbered 4, Your Honor, and the letter which is part of exhibit C, exhibit C refers to section 36 and in the letter it is described as section 36. Erroneously on the plat it is apparently 35. That should be and is section 36 and is a school section, section 36 being a school section of land.

The Court: It is described as 36 and marked 35 on the map?

Mr. Donnelly: 36 is correct, and in that connection, Your Honor, the engineers said it was reserved to the United States for the state of Washington under section 3380 of Pierce's Code. We use Remington's mostly, 7410 and 7412. That is a matter of law, I suppose.

[fol. 187] The two orange tracts I would like to have understood their nature, in case it becomes material. I think it may make some difference in our theory. They are described by the engineer as "tribal" lands. In that connection there has been at that point, at the very point of the dam, the Colville Indian Reservation. Is that correct?

Mr. Graves: I don't know.

Mr. Donnelly: The Colville Indian Reservation does not run there, I understand. That might make some difference in the title to the thread of the stream.

Mr. Graves: I think the Colville Indian Reservation is further down the stream.

Mr. Donnelly: Well, then it will be stipulated that the Indian Reservation does not affect any of the land on the map, Exhibit C.

Mr. Graves: That is correct.

Mr. Donnelly: That the area described as "tribal" lands and shown on the map and colored in orange, the title is in the Federal Government for the Indians in some form or in the tribes.

Mr. Weller: Well, I don't know; that doesn't affect our case and I haven't investigated, so I couldn't say.

Mr. Donnelly: And that the Columbia River at that point is a navigable river.

Mr. Graves: Yes.

Mr. Donnelly: And that there are no conveyances directly from the State to the Federal Government except the reservation as to section 36, the school section.

Mr. Graves: I want to answer that with respect to the statement as to the acquisition of other lands, flowage rights and so forth.

It is agreed that the land within the heavy boundaries here is all that is essential for the work that has been done and that is contemplated to be done in the near future. The flowage rights and any question involving other structures will be something arising in the future and are not involved [fol. 188] in the present situation.

Mr. Luby: As a matter of fact, the engineers' notes produced in 1929 show that this additional acquisition of property and the building of other dams shall extend to the year 2000, so we can't speculate about that today.

Mr. Graves: I just wanted to be sure that in the present case all that is involved in the present case is within these boundaries.

Mr. Donnelly: I believe that is a little indefinite. I think we should stipulate to the facts, the land, that is, flowage lands, and lands to create the pond are being acquired at the present time as the work progresses. The land is being acquired that is necessary.

Mr. Graves: Yes, that will be agreed. The United States is getting lands as it is necessary for its construction.

Mr. Donnelly: That the land to make the project feasible as a power project is now being acquired and a great deal of land in addition to what is shown on exhibit C has been acquired. Those are the facts.

Mr. Graves: Well, that is immaterial as we regard it, but the fact is as stated.

The Court: I don't see how it could have any bearing on the present inquiry, Mr. Donnelly.

Mr. Donnelly: I wish to make the point that no definite reservation has been established on plat——

Mr. Graves: You understand, Mr. Donnelly, that the changes in this contract do away with the dam feature and make it merely a foundation for the high dam.

Mr. Donnelly: Yes, that is why I suggested you might want to stipulate that.

[fol. 189] Mr. Graves: Well, that can be stipulated. That is the fact. The changes that are made do away with the construction of the dam that was contemplated by the original contract and provide for the construction of an enormous base which will sustain the high dam which it is contemplated will be ultimately erected and providing for the irrigation of all the big bend section.

The Court: We are only concerned now with the contract for building this foundation, as I understand it.

Mr. Graves: Yes, Your Honor.

Mr. Weller: It will also be stipulated that this change in the MWAK contract was made after the completion of the contract or contracts with Mr. Ryan. Is that correct, Mr. Donnelly?

Mr. Donnelly: I believe, after the completion of the railroad contract, yes.

Mr. Graves: What is to be constructed under this change is a part of a dam for the purposes defined in the specifications.

Mr. Donnelly: And we wish it specifically understood the land in section 36 colored in purple is being used by the contractor in the performance of this contract in the manner described. It will be stipulated that there are two regularly formed school districts in the area, one in the engineers' town and one in Mason City, under the laws of the state of Washington.

Mr. Graves: I didn't quite understand your statement, Mr. Donnelly.

Mr. Donnelly: I said it will be stipulated that there are two regularly formed school districts in the area under the laws of the state of Washington, one in the government engineers' camp and one in Mason City.

[fol. 190] Mr. Graves: Well, I don't see that it is material, but there will be no disposition to get away from that, Mr. Donnelly. I just wanted to inquire about the facts. You say there are two districts formed within these heavily marked lines?

Mr. Donnelly: Yes.

Mr. Graves: Subject to the objection as to its materiality, that is the fact.

Mr. Luby: Our contention is that it is immaterial, but

probably it had better go in and if it becomes material, why it will be in there.

Mr. Donnelly: I am advised by Mr. Schwellenbach that the district that is in the engineers' camp was established under the Bureau of Reclamation; that it required dissolution of a joint district and that this was done upon the petition of the Bureau; and that the actual status at the area—Mason City, of course, is on this area—and it is built by the contractors as part of their contract.

Mr. Graves: The engineers' camp—may we not explain to the Court what that is?

Mr. Donnelly: Yes.

Mr. Graves: That is the campe that is maintained by the United States for the offices and residences of the officers of the United States, the engineers who are employed there, and it is entirely separate and distinct from the town of the contractors which is called Mason City. It is on the opposite side of the river. So when engineers' camp is referred to it is understood to mean the land which is occupied by employees of the United States as distinguished from the contractors and their employees.

Mr. Donnelly: Now, I would like to stipulate as to the extent in which the counties involved actually participate in the government of that area, for what materiality it may have. It will have some on our theory of the case and [fol. 191] Mr. Schwellenbach is more familiar with that; maybe he could state it better than I.

Mr. Schwellenbach: That in Mason City the Policemen who are employed by the Mason Company have been deputized as deputy sheriffs of Okanogan County; that Mr. Mallock, the attorney for the Mason Company located at Mason City, has been appointed a Justice of the Peace in Okanogan County; that Dr. Sorenson, one of the doctors in the Mason Hospital, has been appointed as a deputy coroner in Okanogan County; that prior to the enactment of the Steele law, a number of beer parlors were operating in this area in Grant County under permits issued by the county commissioners of Grant County; and that in the fall of 1933 one of these operators was fined in Justice Court for operating without a permit as provided in the ordinance; that on Christmas Eve of 1933 the sheriff and prosecutor of Grant County were called to the dam site on the complaint of one of the beer parlor operators and on the following day the

man was brought into the Justice Court and convicted of assault in connection with this particular fight; that on January 25th, 1934, the sheriff of Grant County was called to the dam site on the complaint that an insane man was at large there. That is, I want it understood this is all within this area which is in controversy here.

That in November 1934, the sheriff was called to the dam site in this area to investigate the theft of some water taps in the possession of a sub-contractor operating on this property; that about the same time the prosecutor was called there as coroner to investigate the accidental death of a man killed while working for Priek and Kinney, contractors, who were building the railroad and highway on this property; that a man named Louis Kroll is operating a beer parlor right down on the river in this area and has been selling beer under a license issued to him by the Liquor [fol. 192] Control Board of the state of Washington; that at various times the coroner of Grant County has been called down to this area to investigate the accidental death of men who were employed by the contractors on this particular area.

Mr. Donnelly: You are the coroner?

Mr. Schwellenbach: Yes, in this particular area.

The Court: You are asking to have those facts stipulated?

Mr. Schwellenbach: Yes, Your Honor.

The Court: Do I understand they are agreed to, subject to their materiality?

Mr. Luby: Subject to raising that question at any time as to materiality.

Mr. Graves: I have no doubt in that country they rustle around considerably.

Mr. Donnelly: I would like to have it stipulated that the MWAK Company have regularly made applications to the Director of Licenses for the state of Washington for refund of the gasoline tax paid in the area on the grounds, among others, of operating trucks illegal for use on the highway and that they are over eight feet in width; and that, under the law as construed prior to the going into effect of the 1935 Act, refunds were regularly made to the MWAK of such gasoline taxes as were paid as were used in the machinery on the dam and trucks that were too large to operate on the highway.

Mr. Graves: Subject to the objection that it is immaterial, the facts are admitted.

Mr. Donnelly: That prior to the construction of the railroad from Odair to the dam site the contractors transported the materials by truck of such proportions that a special permit was required to operate on the public highway; and that such special permits were granted by the state authorities.

Mr. Graves: Subject to materiality, that is admitted.

[fol. 193] Mr. Donnelly: That there are two private corporations in Mason City, the Coulee Trading Company and the Mason City Company, which transact private business; which is the hotel and moving picture theatres and gasoline distributors and general merchandise business. That, as to private parties in Mason City, the appropriate state tax was collected and paid to the state, sales tax, admission tax, and that no sales tax is, in fact, collected on sales by this company to the Mason-Walsh Company in that area.

That the Mason-Walsh Company, operating its mess hall, collects the tax itself and pays it to the state on meals sold to other than employees of the company;

That the Mason-Walsh-Atkinson Company—I am not sure whether counsel has stated it—is qualified to do business in the state. They have qualified to do business in the state of Washington.

Mr. Graves: I think that is pleaded. All of this goes in subject to our objection as immaterial. The facts are agreed where we do not dissent.

Mr. Donnelly: Yes, I understand also that a great amount of this may be inadmissible that is in evidence already.

Mr. Graves: Yes.

The Court: Well, these questions will be raised at the time of the argument, no doubt, and considered by the court.

Mr. Donnelly: Now, if the Court please, as to the amount of the evidence which Mr. Graves and I have stipulated, I understand may be used in the Ryan cases. Under our theory of the case the state feels that the character of the reservations is in issue and we would like the stipulation as to the map to be a part of that and that the letter accompanying it and those stipulations be made a part of the Ryan case.

[fol. 194] Mr. Weller: That may be done.

Mr. Donnelly: Would there be anything wrong with

stipulating so far as material in the MWAK case that the stipulations may apply in the Ryan case?

Mr. Weller: Well, the question in regard to that would be in the making up of the record, Mr. Donnelly. So far as the stipulations with Mr. Graves are concerned, I know that a good many of them are true and I don't question the truth of any of them; but a lot of them are not applicable to our cases. It might be rather difficult to make up the record unless we should stipulate that certain of those should apply in our cases.

Mr. Donnelly: Well, I went along here each time without calling attention to what cases, Mr. Weller.

Mr. Weller: It is agreeable to us that any of the matters which have been stipulated here which are applicable to the Ryan cases may be used in those cases. The only thing would be the difficulty of segregation.

Mr. Donnelly: Well, in general, we wish to show the area, the nature of the area, the map and the way it is actually used now.

Mr. Weller: So far as the map is concerned, that is perfectly agreeable to us; but, as Mr. Luby suggested, so many of the things which have been mentioned here happened after Mr. Ryan had completed his two contracts they could not affect him in any way.

Mr. Graves: As you introduced the evidence in the other cases, as we went along, I stated what I wanted included in this case, something that went into the Ryan case, I noted that.

Mr. Donnelly: Well, I believe if the States offers a daily transcript here of what has happened, that we can get at it later.

Mr. Weller: Yes.

Mr. Donnelly: And rest on the stipulation now as made.

Mr. Weller: That is satisfactory.

[fol. 195] Mr. Donnelly: As a final thought, I wonder if it will be too much, after we look over the stipulations, anything additional or anything wrong that should be taken away that we can agree on it tomorrow?

Mr. Graves: That is all right.

Mr. Donnelly: Then we will rest with that understanding.

Mr. Graves: We have no rebuttal evidence.

The Court: Both sides rest, then, I understand.

Mr. Donnelly: I presume the appellant Ryan and the plaintiff will proceed.

The Court: I presume so.

(Arguments of counsel.)

Excerpt from the Statement of Facts beginning with line 9 on page 4, to and including page 60, in the case of Silas Mason Company, Inc., v. Tax Commission of the State of Washington, No. 26059.

[File endorsement omitted.]

[fol. 196] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 197] SUPREME COURT OF THE UNITED STATES

ACCEPTANCE OF SERVICE

Service of copy of Appellants' Statement of Points Relied upon and Designation of Parts of the Record to be Printed in the above entitled cause is acknowledged this 24th day of February, 1937.

E. P. Donnelly, Attorneys for Appellees.

[fol. 198] SUPREME COURT OF THE UNITED STATES

Appellants' Statement of Points Relied Upon and Designation of Parts of the Record to be Printed—Filed March 3, 1937.

POINTS RELIED UPON BY APPELLANTS

Appellants intend to rely upon the following points as ground for reversal of the judgment of the Supreme Court of the State of Washington from which the appeal herein is taken:

That the statute of the state of Washington imposing an occupation tax is unconstitutional and void as applied to the particular transactions stated in the complaint of appellants in this:

I. That the challenged tax is levied directly upon the consideration paid by the United States to the appellants

[fols. 199-201] for the performance of a contract by means of which the United States government is carrying on a governmental enterprise. The Supreme Court of the State of Washington erred in holding such a tax to be a valid exercise of the taxing power of the State, and erred in confirming the judgment of the Supreme Court of the State of Washington, for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

2. That the contract between the United States government and appellants upon which the challenged tax is levied is being performed upon land acquired by the United States for the purpose. Exclusive jurisdiction over this land has been ceded by the State of Washington to the United States. The Supreme Court of the State of Washington erred in holding that the State of Washington has power to tax the occupation carried on by appellants in that territory, and erred in affirming the judgment of the Superior Court of the State of Washington for Thurston County, which upheld the validity of the tax and therefore denied injunctive relief to appellants.

PARTS OF RECORD TO BE PRINTED

Appellants state that the whole of the record sent up from the Supreme Court of the State of Washington in accordance with the praecipe filed in this court jointly by appellants and appellees, is necessary for the consideration of the case and should be printed.

Dated this 23d day of February, 1937.

B. H. Kizer, Oswald L. Graves, Counsel for Appellants. Graves, Kizer & Graves, of Counsel for Appellants.

[fol. 202] [File endorsement omitted.]

Endorsed on cover: File No. 41,313. Washington Supreme Court. Term No. 773. Silas Mason Company, Inc., Walsh Construction Company, et al., appellants, vs. Tax Commission of the State of Washington, et al. Filed March 3, 1937. Term No. 773, O. T., 1936.

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